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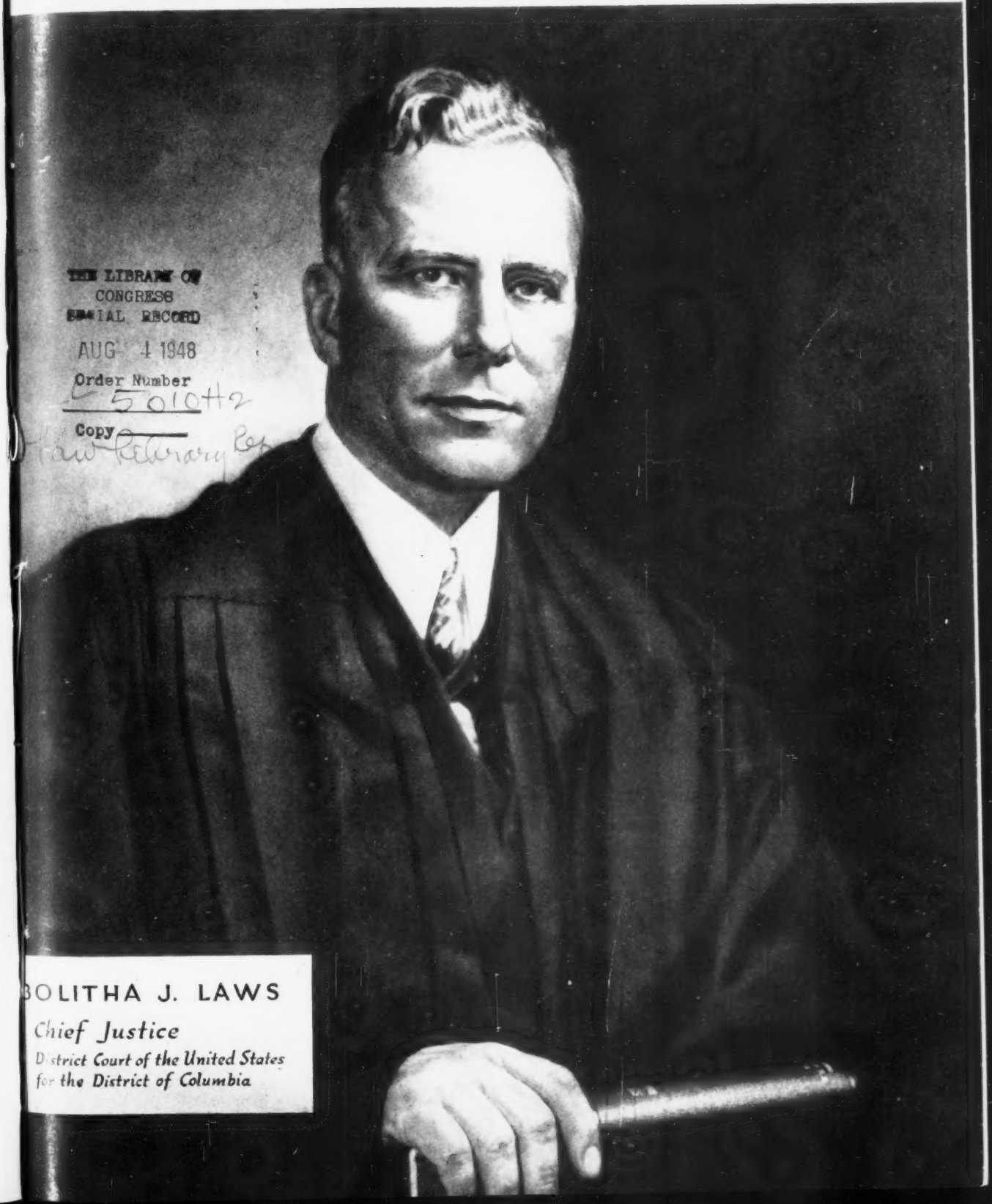
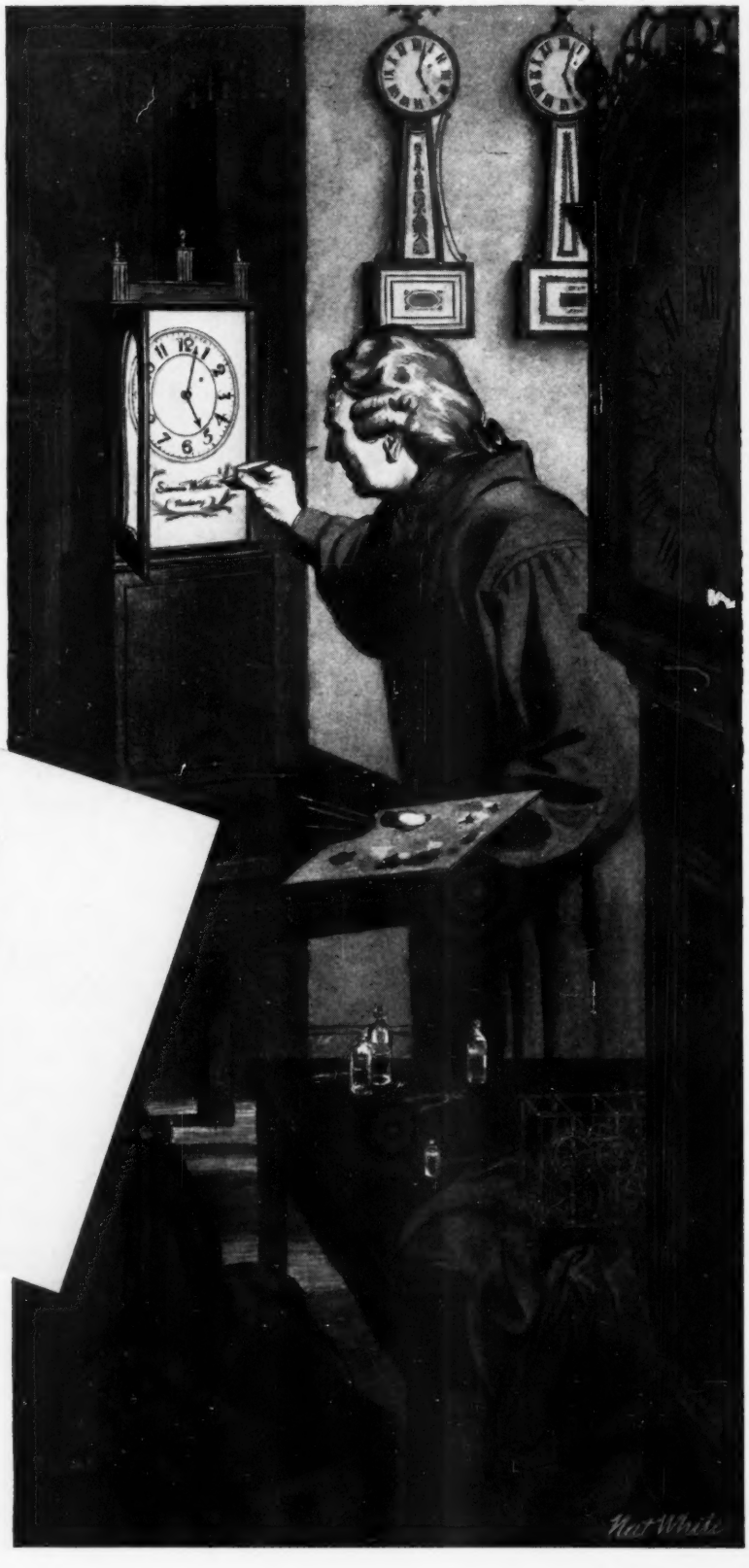


BOLITHA J. LAWS
Chief Justice
District Court of the United States for the District of Columbia

Crane's.....the enduring Mark in fine papers

Many an early American clock still strikes the hours with rare fidelity. An object of beauty and utility, it is also an expression of craftsmanship, the pride of the maker still attested by his name on the dial or by a label pasted on the inside of the case.

If we counted the hours since the Crane mills were established, the figure would be rather impressive. Continuously, since 1801, we have been making fine papers of cotton and linen fibres only and watermarking each sheet with the name of Crane. This continuity and this fidelity to the highest standard of quality give Crane's Papers a difference and distinction that make them highly desirable for business and personal correspondence, social forms and needs, and for matters of importance that you would protect against time itself. When next you buy paper, we suggest you look for the mark of Crane by holding the sheet of paper against the light.



CRANE'S
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Contents

DECEMBER, 1947

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
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In This Issue

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scholarly appraisal by Professor Herbert W. Briggs. Walter P. Armstrong tells about Benjamin P. Thomas' *Portrait for Posterity*. There are lively angles in Richard Joyce Smith's review of Professor Milton Katz's work on administrative law. Brief reviews or "notes" are given as to books which are useful "tools of our profession".

Proceedings of 1947 Assembly in Cleveland **22**

Supplementing what was in our October and November issues, which contained many of the addresses and reported some of the actions taken, we summarize the proceedings of the five sessions held in Cleveland by the Assembly under our Association's bi-cameral system.

American Lawyers to Help Rebuild Inns of Court **23**

Our Association's Special Committee on the Restoration of the Inns of Court in London, historic shrines of the common law that were badly damaged during the Nazi "blitz", is gearing itself to a program of action for the solicitation of funds to rebuild these cherished landmarks. The Committee's plans are announced in this issue.

Two New Members of the Board of Editors

Judge Robert N. Wilkin of Cleveland and Richard Bentley of Chicago have been elected by the Board of Governors as members of the Board of Editors. The resignation of Thomas B. Gay, of Virginia, was reluctantly accepted after his nine years of capable service on the Board of Editors.

Major Edgar Bronson Tolman Dies in His 89th Year

We record on page 1188 the passing of the beloved Editor-in-Chief Emeritus of the JOURNAL, who served as its Editor-in-Chief from 1921 to 1946 and was a leader of the Bar of Illinois and a tireless worker for the improvement of judicial procedure.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946

Of AMERICAN BAR ASSOCIATION JOURNAL published monthly at Chicago, Illinois for October 1, 1947. State of New York, County of New York.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared William L. Ransom, who, having been duly sworn according to law, deposes and says that he is the Editor of the AMERICAN BAR ASSOCIATION JOURNAL and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily, weekly, semiweekly or triweekly newspaper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the act of August 24, 1912, as amended by the acts of March 3, 1933, and July 2, 1946 (section 537, Postal Laws and Regulations), printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, AMERICAN BAR ASSOCIATION, 1140 N. Dearborn St., Chicago 10, Ill.

Editor, William L. Ransom, 33 Pine St., New York 5, New York.

Managing editor, There is none.

Business manager, There is none.

2. That the owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member, must be given.)

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3. That the known bondholders, mortgagees, and other security holders owning or holding one percent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.)

There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholders or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the twelve months preceding the date shown above is..... (This information is required from daily, weekly, semiweekly, and triweekly newspapers only.)

WILLIAM L. RANSOM

Sworn to and subscribed before me this 23rd day of October, 1947.

(SEAL) CATHERINE DUNNE

(My commission expires March 30, 1949)

Notary Public in the State of New York.

Residing in Queens County.

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ANNOUNCEMENT of 1948 Essay Contest Conducted by AMERICAN BAR ASSOCIATION

Pursuant to terms of bequest of Judge Erskine M. Ross, Deceased.

INFORMATION FOR CONTESTANTS

Subject To Be Discussed:
"What Steps Should Be Taken by the National and State Governments to Preserve the American Federal System and Restore Powers and Responsibilities to the State and Local Governments?"

Time When Essay Must Be Submitted:
On or before April 1, 1948.

Amount Of Prize:
Twenty-five Hundred Dollars.

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1948, (except previous winners, members of the Board of Governors, Officers, and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

AMERICAN BAR ASSOCIATION

1140 N. Dearborn Street — Chicago 10, Ill.

Judicial Selection and Tenure:

"Missouri Plan" Works Well in Actual Results

by **James M. Douglas** • Supreme Court of Missouri

■ Throughout the United States, lawyers and other citizens who seek to accomplish the selection of highly qualified lawyers as State judges, take the judiciary out of politics and free it of political dependence, and give judges greater security of tenure, are intensely interested in the "Missouri Plan", adapted from that formulated and approved ten years ago by our Association. They are especially eager for details as to how the plan has worked in actual operation in a great and politically minded State.

Judge Douglas, member of our Association since 1929, a member of the highest Court of his State for about ten years, chosen as its Chief Justice in 1943, has told the impressive story of his State's innovation in judicial selection and tenure. The following account is from his address at the 1947 meeting of the Alabama State Bar in Birmingham, under Wm. Logan Martin as President.

■ The State of Missouri has followed from time to time three different methods of selecting judges, in its search for one which will provide an independent judiciary. As we all well realize, only with an independent judiciary can a real democratic form of government exist. The judiciary must be fully independent, not only of the other branches of government but the so-called pressure groups and of political organizations as well. Our system of government requires an independent judiciary to guard both the Constitution and the rights of individuals. The importance of independent judges was fully recognized by those who wrote our Federal Constitution. One of the complaints in the Declaration of Independence had been addressed to the control of the Colonial judges by the King.

For freedom from the political pressure which ordinarily attends an elective office on a party ticket, security in office is the keystone of the independence of a judge. The ex-

Improvement of State Judicial Systems

[An Editorial]

■ Reading of election returns and the proceedings of State and local Bar organizations as reported in "Bar Association News" in this and other issues leads us to the conclusion that the selection and tenure of the judges of State Courts and the further improvement of State judicial systems will be actively considered in many States during 1948. Indeed, the time may be opportune for a general "forward march", under the leadership of the organized Bar. This is a time to be bold with forward steps.

Public opinion shows signs of awakened interest. In New Jersey, many years of efforts by many lawyers for reform of an ancient but antiquated judicial system came to climax with the decisive adoption, by vote of the people on November 4, of a new State Constitution that contains a thorough-going modernization of the State's judicial structure, its administration, rules of procedure in all Courts from the highest to the lowest, etc. When the new judicial system goes into effect on September 15, the Chief Justice of the State will be our own Arthur T. Vanderbilt, who has been outstanding in his tireless work for improving the administration of justice in his own commonwealth and throughout the land.

New York State, perhaps strategically, took up first the adoption of a constitutional system for the trial and removal of unfit judges—an alternative to cumbersome removal by the legislature. The State Constitution was amended to create a Court on the Judiciary, made up of the Chief Judge and the Senior Associate Judge of the Court of Appeals, and one Justice of the Appellate Division in each of the four judicial departments. The affirmative concurrence of not less than four of the six members of the Court is required for the removal or retirement of a judicial officer. The plan is generally similar tc that several times recommended by our Association as to federal judges, through approval of the Sum-

tent of that security must be sufficient to free a judge of political dependence but not so absolute as might lead to or permit a neglect of duty or abuse of power.

Previous Methods of Selecting Judges in Missouri

Under Missouri's Constitution of 1820, the Governor appointed all the judges of the Supreme and Circuit Courts, with the advice and consent of the State Senate. The judges so appointed held office during good behavior.

Then beginning in 1830 and lasting some twenty years, the method of selecting judges in the various States changed generally throughout the country. Appointment of judges for life was abolished, and election for short terms was substituted in all but a few States. This was done in Missouri by a constitutional amendment adopted in 1851.

Criticisms of Judicial Elections

This method of selecting State judges has become increasingly subject to criticism. It has been fairly well agreed that in many instances the independence of the judge has been impaired and that the standards of our State Courts have been lowered. James Bryce, writing in 1859, commented:

> Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.

Origin of the "Missouri Plan"

The need for improving the judiciary of the States was recognized by the American Bar Association in 1937, when a resolution was adopted by the House of Delegates designed to establish methods of judicial selection which would take judges out of politics as far as possible. There followed an exhaustive study of the subject by the Association's Committee on Judicial Selection and Tenure, under the leadership of John Perry Wood of California.

A year or so later, several of our leading lawyers organized the Missouri Institute for the Administration of Justice, for the purpose of seeking ways and means of improving the administration of justice. This was not a group whose membership was restricted to lawyers or even one where the lawyers were in the majority. Layman participation was sought for and achieved. The Institute's successes were due in a large part, I think, to the fact laymen were in the majority. Of 150 members there were 100 laymen; fifty lawyers represented the Bar of the entire State. On the Executive Committee which was to draft in legal form any recommendations the Institute might foster, there were ten lawyers and five laymen.

A committee of the St. Louis Bar Association presented to the Institute for study and approval a draft of our present method of selecting judges, now referred to as the "Mis-

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ners bill to provide a tribunal (other than the Senate) for the hearing of charges of judicial conduct amounting to less than "good behavior."

For the first time in the history of New York, the State Bar Association (voluntary and non-integrated) was written into the Constitution by vote of the people, as an integral part of the procedures for removing unfit judges. Charges against a judicial officer may be filed by the Governor, by the Presiding Justice of an Appellate Division, by a majority of the Judicial Council, or by "a majority of the Executive Committee of the New York State Bar Association". In what other States has its Bar Association been given like constitutional recognition?

Several influential newspapers opposed the amendment because the legislature had retained in it the historic procedure for trial and removal by the legislature. Nevertheless the people, both upstate and in New York City, voted for the amendment emphatically. State and local Bar Associations, and an independent committee outside them, are at work on the structure of a constitutional amendment for an improved method of selecting judges. Governor Thomas E. Dewey has given active support to the project.

In States as far apart as Colorado and Rhode Island, for example, this month's reports show that the State Bars are actively at work for improvement in the judiciary and better methods of judicial selection. Others could be cited. In Ohio, President Joseph D. Stecher of the State Bar is making an improved method of selecting judges the chief objective of his Association's work. States which have the appointive system are holding fast to it; but States in which partisan nominations and elections prevail are seeking improved methods—in principle the plan recommended by our Association in 1937, the "Missouri Plan" and the compromise "California Plan", which appears to work well under a Governor like Earl Warren who is staunchly devoted to Bar Association standards.

During 1948 we shall publish informative material as to the State judicial systems and improved methods of judicial selection. In all this there will be no thought of criticizing the State judiciary as an institution; we know it to be a bulwark of law-governed justice, the stronghold of much of the best in the American system. The need and opportunity to eliminate partisan politics from the selection of judges and to improve judicial administration in many of the States are enhanced by the marked interest which voters and the general public are manifesting in those subjects. The Bar should not "miss the boat".

souri Plan", but patterned after the plan recommended by the American Bar Association. The Institute adopted the draft as its own and prepared it in the form of a constitutional amendment. Then the Institute organized sub-committees in each of the 114 counties to interest the citizens in the plan, and to obtain the necessary signatures to initiative petitions for placing the plan on the ballot.

"Missouri Plan" of Judicial Selection Is Adopted by the People

At the election of 1940 the plan was adopted as an amendment of the State Constitution, by more than 90,000 votes. The politically minded were astounded. They had been certain the people would not relinquish the right to nominate the judges at primary elections, and would not approve the proposed plan. And when the people voted for it, the politically-minded were confident the people did not know what they had done. So, through the Legislature, a constitutional amendment was proposed to repeal the plan. This put the issue back again to the voters. Evidently the people had known what they were doing, because when they voted again at the 1942 election the plan was retained by more than 180,000 votes.

The issue was debated once more in the recent constitutional convention of the State, which reincorporated the plan in a proposed new Constitution without change except to place more judges under it. The popularity of the plan with the people had much to do with the large vote by which the new and progressive Missouri Constitution of 1945 was adopted.

Thus the voters of Missouri spoke three times, each succeeding time with increased approval of the plan.

Summary of the "Missouri Plan" for Selecting Judges

The plan is mandatory as to the Supreme Court, the three Courts of Appeals and the Circuit and Probate Courts of Jackson County (which includes Kansas City) and the City of St. Louis. As to the other thirty-six Circuit Courts (Missouri has thirty-eight Circuits), the plan is optional—subject to adoption by the vote of the people in each circuit. Thus, the plan was first made mandatory as to the Courts where the size of the electorate made it impossible for the candidate to be personally known to more than a handful of voters, and was left optional as to the other Courts where the candidates are closer to the people.

Nominating or Selection Commissions Provided as to Judges

Appellate jurisdiction in Missouri is vested in a Supreme Court and in three separate Courts of Appeals. The State is divided into three appellate Court districts: One for the St. Louis Court of Appeals, one for the Kansas City Court of Appeals, and one for the Springfield Court of Appeals. Judges of the Supreme Court are elected by a State-wide vote, those of the various Courts of Appeals, by the voters of their particular districts.

The plan provides for two sorts of Selection or Nominating Commissions called "Judicial Commissions." The Appellate Judicial Commission selects nominees for all appellate Courts. Then there are Circuit Judicial Commissions, one for each judicial circuit included in the plan.

JAMES M. DOUGLAS

The Appellate Judicial Commission is composed of three lawyers who are elected, one from each Court of Appeals district, by a mail vote of the lawyers residing in each district; three laymen, one from each Court of Appeals district, appointed by the Governor. The seventh member is the then Chief Justice of the Supreme Court, *ex officio*, who is the Chairman of the Commission. The office of Chief Justice is rotated among the seven judges of the Supreme Court by their own balloting.

The Circuit Judicial Commissions for the two Circuit Courts have five members each. Two lawyer members are elected by the Bar of the Circuit; two lay members are appointed by the Governor; and the fifth member is the Presiding Judge of the Court of Appeals of the district in which the circuit is located, *ex officio*, who acts as Chairman.

The members, other than the chairman, have six-year terms, staggered so that no more than one term

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Concerning the Author: James Marsh Douglas was born in St. Louis in 1896 and was graduated in law from Washington University in St. Louis in 1921. He saw Mexican border service in 1916 as a private in Battery A of the Missouri National Guard, entered the first O.T.C. at Fort Riley, Kansas, in 1917, saw overseas service as a first lieutenant in the 342nd Field Artillery, and was in the Army of Occupation. He was admitted to the Missouri Bar in 1917 but began practice in St. Louis in 1921. He was elected a judge of the Circuit Court in St. Louis in 1934, and was appointed to the Supreme Court of Missouri in 1937. He was elected to the Court over the opposition of the Kansas City organization of his party in the bitterest Court fight in the history of the State, and was re-elected at the expiration of his term. He was a member of the State Defense Council during World War II, and became Chief Justice of his Court in 1943.

In politics he is a Democrat. He has been a member of our Association since 1929, and is also a member of the American Law Institute. In 1931-33 he was national president of Phi Delta Phi, and has been since 1940 the president of the Missouri Historical Society.

ends in the same year. Members are not eligible to succeed themselves and serve one term only.

Since our Governor is limited to a single term of four years, no one Governor can effectively control any Commission through his appointments. No member of a Commission, other than the chairman, may hold other public office, and no member may hold any official position in any political party.

The "Missouri Plan" in Action

Whenever a vacancy occurs in the office of any judge affected by the plan, the following three steps for nomination, appointment, and election are taken:

(1) The appropriate judicial commission selects three persons possessing the qualifications of the office, and submits their names to the Governor;

(2) The Governor *must* appoint one from the three submitted, to fill the vacancy;

(3) After the person so appointed has served a probationary period of at least twelve months, he must then be voted on by the people at the next general election. At such election he has no opponent, but runs on his record. His name is placed on a separate judicial ballot without party or political designation, in the following manner:

Shall Judge ———————
of the ————————Court be
retained in office?
Yes No.

The voting is by scratching one answer and leaving the other. If the vote is favorable, he [incumbent] then serves a full term thereafter—six years for a Circuit judge, twelve years for an appellate judge. But if the judge be not retained, then the nominating and appointing procedure is again invoked.

Thus the judge runs against no political opponent, against no political party or policy, but runs only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect that he will receive a favorable vote.

The judges on the bench at the time of the adoption of the plan continue to serve out their regular terms. If such a judge desires to run for re-election upon the expiration of his term, he merely files his declaration of candidacy for re-election, and his name is placed on the judicial ballot without further action of any kind. He is voted on at a general election in the same manner as a newly appointed judge: "Shall Judge———— of the ——— Court be retained in office?" His candidacy for re-election is not subject to any action by the Judicial Commission.

A judge who has been elected under the plan runs for reelection in the same manner. Neither is his candidacy for re-election subject to any action by a Judicial Commission. In both instances the judges run for re-election on their records, as in the case of a newly appointed judge whose record is passed on by the voters for the first time. Of course, should a judge running for re-election be not retained in office, then a vacancy would arise, and the procedure for selection and appointment provided by the plan would be invoked to fill the vacancy.

"Missouri Plan" Combines Best Features of Other Systems

The plan combines the best features of both the appointive and elective systems and adds new safeguards which assure better judges. The selection of nominees is made by a group which has no other function and whose only interest is to name the best man available. The Judicial Commission is representative of the bench and the Bar, and the people, for whom the Courts are established. The fact that his choice must later be confirmed by the people would make a Governor exercise caution in choosing the appointee from the three selected.

Then the necessity of approval by the entire electorate of the appointee's record tends to insure faithful service on the bench. If a judge decides to make a career of the bench, the requirement of confirmation of his record from term to term likewise insures faithful service throughout his career.

In the seven years the plan has been operating, only lawyers and laymen of high character and integrity have been selected as members of the Judicial Commissions. In that interval we have had a Democrat as Governor, then a Republican, now a Democrat.

During the same interval no selection by any Commission has ever been criticized by the Bar or the press, although nominations to fill nine vacancies have been made—two for the Supreme Court; two for different Courts of Appeals; two for the Circuit Court of Jackson County; one for the Probate Court of Jackson County; and two for the Circuit Court of St. Louis. In every instance all of the nominees have been widely and generally approved. Choosing men of character, ability, learning and industry has been the rule.

Lawyers with successful practices but no political bent have been induced to give up the practice and come on the bench. A State-wide campaign over a State as large as Missouri for office on the Supreme Court has seldom proved to be an attraction to the successful, learned, studious practitioner, but by the present plan men of such type are being added to that Court.

Politics Are Not a Factor in the Election of Judges

It is interesting to observe the operation of the plan in the general elections which have been held since its adoption. In 1942 the State went Republican, but two qualified Supreme Court Judges, both Democrats, ran for re-election and were retained in office. The City of St. Louis, which also went Republican, re-elected six Democratic Circuit Judges and retained a Republican Circuit Judge previously named by the Governor under the plan. Jackson County went Democratic, but the voters there *removed* one Circuit Judge, a Democrat, and *retained* one, also a Democrat, who had

(Continued on page 1241)

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Erskine Mayo Ross:

Courageous Jurist and Generous Benefactor

by **Alexander Macdonald** • of the California Bar (Los Angeles)

■ In further fulfillment of our endeavor to obtain and publish portrayals of outstanding personalities of the bench and Bar of recent generations and to do this while the treasured recollections and records of men who knew these great figures of our profession can still be called on and explored, we present this month a sketch of a courageous and beloved jurist whose name and generous benefaction will endure in our Association. Mr. Macdonald found a veritable "mine" of unpublished material in Judge Ross' correspondence and papers. He has written a most readable sketch of a modest but fearless jurist, great son of Virginia and his adopted State of California, whose career and exemplary course should long be recalled, quite aside from what he did for our Association.

His testamentary gift in trust for the founding of an annual competition and contribution to enlightened discussion of vital issues is both a permanent memorial of his patriotism and devotion and an illustration of what lawyers and others of means can do, through the instrumentality of our Association. It is appropriate to recall here the Ross Essay subjects and the winners of the prize (71 A.B.A. Rep. 436). Judge Ross could hardly have foreseen the contributions which those essays have made to an informed public opinion, and the part which some of the winners have come to play in our profession and our Association—such men as Carl McFarland, Benjamin Wham, Willard Bunce Cowles, Lester B. Orfield and Eugene C. Gerhart. Truly it may be said of Judge Ross: "He builded better than he knew." The following sketch we commend to all of our readers.

■ The date was May 2, 1864. The Union Army was marching up the Shenandoah Valley from Winchester to New Market, with its objective the town of Staunton, and its purpose the cutting off of the Virginia Central Railroad (now the C. & O. Railway). This, if accomplished, would have deprived General Lee's Army of one of its chief sources of supply. The only Confederate troops in the Valley at this time were those of General J. D. Imboden. Desperately in need of assistance, General Imboden sent word to the Superintendent of the Virginia Military Institute to hold its Corps of Cadets in readiness.

On May 15, 1864, about one o'clock on a dark and rainy night, the cadets were awakened and assembled in formation to start their march to the New Market battlefield. Later on that day they charged the troops of the North and routed them. Erskine Mayo Ross was cadet first sergeant of Company A.

Although young Ross had yet to reach his nineteenth birthday when he took part in the battle of New Market, he was already a veteran. Born on June 30, 1845, on his grandfather's plantation, "Bel Pré," in Culpeper County, Virginia, the son of William Buckner Ross and Elizabeth Mayo (Thom), he entered V.M.I. on July 25, 1860. Shortly thereafter he went to Richmond with the Corps of Cadets under Major (later "Stonewall") Jackson to drill recruits at Camp Lee. In July of 1861, he was assigned to the "Irish Battalion" of the Provisional Army of Virginia. With these forces he participated in the Valley Mountain campaign, and was complimented by General Jackson for personal bravery at the Battle of Cedar Run.

The future United States Circuit Judge returned to V.M.I. in the fall of 1864, and became the cadet captain of Company A (the highest ranking cadet officer). He was graduated the following year. The Ross family, in common with other Southern families, was impoverished by the Civil War. The plantation at Bel Pré was ruined, and the family scattered. Young Ross obtained work as a clerk in a mercantile establishment in Richmond. While so employed, he and two other New Market cadets founded on September 11, 1865, the Alpha Tau Omega fraternity.

It is not clear whether at this time

ALEXANDER MACDONALD

he had ambitions to become a lawyer, or whether he later embraced the profession at the suggestion of his uncle, Cameron E. Thom, who was then a practicing lawyer in Los Angeles. One thing is certain, and that is that the three years following the end of the Civil War were grim ones; and in May of 1868, on his uncle's invitation, he went to California by way of the Isthmus of Panama.

His early struggles in California are best described in his own words. In 1904 he said: "I at once commenced the study of the law, part of the time only at night, as at times I had to do other work during the day to make both ends meet . . . " Apparently this "other work" was no handicap in preparing himself for the law, because he was admitted to the Bar in 1869. Ten years later he was elected a Justice of the Supreme Court of California!

On May 7, 1874, he married Miss Inez H. Bettis, of Los Angeles, and they had one son, Robert Erskine Ross, born March 30, 1875. His wife died in 1908, and in 1909 he married Ida Hancock, widow of Major Henry Hancock, the engineer who planned the modern city of Los Angeles. The second Mrs. Ross died in 1913.

Resignation from Supreme Court; Appointment to Federal Bench

The judge first announced his intention of resigning from the State Supreme bench in late 1884 or early 1885. He stated that the climate of San Francisco had never agreed with him or his family. Immediately after this announcement was made public, he was presented with a petition, signed by more than a hundred leaders of the Bar, who urged him not to resign. Thus importuned, he deferred action for the time being; but in November of 1885, he again made known his intention to retire from the Court, his resignation to take effect on January 1, 1886.

Once more there was a protest; not only from the Bar but from the public as well. The press was filled with editorials praising his services and urging him to remain on the Court. He partially yielded to the public demand by postponing his resignation until the next election, in order that the public might choose his successor. In November of 1886, Jackson Temple was elected to replace him. Judge Ross returned to Los Angeles and resumed the practice of law in partnership with Stephen M. White, an outstanding advocate in the early days of Los Angeles. This association was of short duration, because after but a few months of practice the Judge accepted an appointment by President Cleveland to be the District Judge of the newly created District of Southern California.

In 1895, Judge Ross was appointed Circuit Judge for the Ninth Judicial Circuit, which position he held until he retired. Upon his retirement, President Coolidge wrote a letter of commendation in which he referred to the Judge's record as one "which will long stand as a memorial to a just and fearless and able judge".

An Exemplary Concept of Judicial Conduct and Aloofness

During his entire judicial career, which lasted almost a half century, Judge Ross led a secluded life. Although kindly and fond of human companionship, his concept of judicial conduct forbade any gregarious activities, social, political or otherwise. Perhaps this aloofness from the affairs of the community accounts for the fact that he never wrote anything for publication other than his judicial opinions, which appear in volumes 54 through 71 of the California reports and volumes 32 through 273 of the *Federal Reporter*. In fact, even his letter writing seems to have been limited, aside from personal correspondence, to communications required in the performance of his judicial duties.

As a judge he left little to be desired. He was gentle and tolerant of his fellow man; his patience with, and kindly manner toward, litigants, counsel and witnesses were proverbial. Yet, whenever the processes of the law were threatened, or even questioned, he was fearless and uncompromising. He was a man of great legal learning, devoted to the

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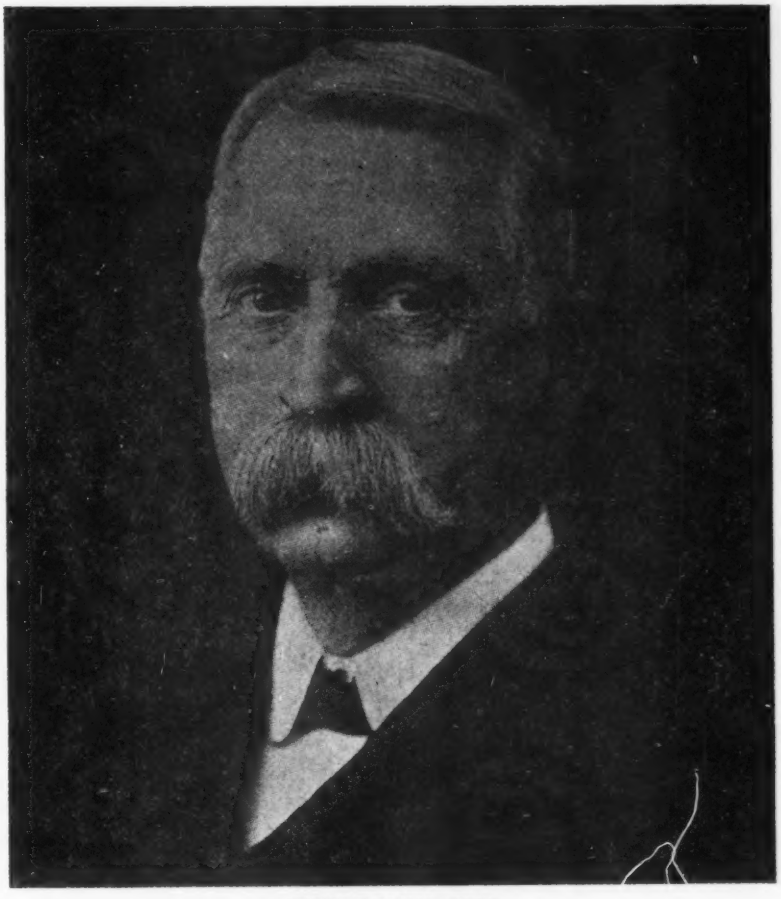
Concerning the Author: Alexander Macdonald was born November 18, 1889, at Louisville, Kentucky. He received his B.A. degree in 1911 and his LL.B. degree in 1913, at the University of Virginia, and was elected to Phi Beta Kappa. In February of 1914, he was admitted to the California Bar, and was first a law clerk in the then firm of O'Melveny, Steven and Millikin, in Los Angeles.

In May of 1917 he entered the first Officers' Training Camp at the Presidio of San Francisco, and was graduated as a first lieutenant in the Field Artillery. After serving for six months in France, he was discharged from the service at Camp Lewis, in Washington State, in February of 1919.

He returned to the practice of law in Los Angeles and shared offices with Alfred Wright. In 1921, with Harry J. Bauer and Alfred Wright, he formed the firm of Bauer, Wright and Macdonald, and has practiced law continuously since then, with that firm and successor firms, with the following exception: In July of 1942 he took leave of absence from his firm to serve as a Deputy Regional Director of the War Production Board in the Los Angeles area. In September of 1943 he resigned to resume practice with his firm, which now is Macdonald and Pettit.

truth, clear in his expositions, and possessed of what Judge Claude T. Reno, National Historian of the Alpha Tau Omega fraternity, has happily described as an "intellectual gallantry." He was the true Southern gentleman personified; courteous and dignified, but inflexible where honor and truth were concerned. Although it is always dangerous to deal in superlatives, it is safe to say that no one who knew Judge Ross considered his integrity to be less than absolute.

When he first ascended the bench, and indeed for some years thereafter, the States and territories of the West were still a frontier. Life was rugged and direct, and there were many who attempted to take the law in their own hands. It was with such a community as a background that Judge Ross' zeal for the supremacy of the legal process was brought into play. It is not surprising that a number of his decisions reflect the conflict between the law and the high-handed methods of those who sought to bypass it. Judge Ross' personal and judicial character revealed itself again and again in his opinions.



ERSKINE MAYO ROSS

His Thoughts on the Integrity of Justices and Judges

One of the last cases in which Judge Ross participated while serving as a justice of the California Supreme Court was the Buckley case (*In re Buckley*, 69 Cal. 1). This case was a *cause célèbre* at the time. Chris Buckley, a blind saloon keeper, was the political "boss" of San Francisco. The Buckley case was a contempt proceeding in which it was charged that Buckley had agreed and undertaken with a litigant, for a consideration of $500, to procure judgments in favor of the litigant and another in certain cases then pending in the Supreme Court of California. All seven justices agreed that the charge, if proven, would constitute contempt, but the four members of the Court concurring in the majority view held that the conflict in the testimony was so great that proof of the charges was not clear.

Judge Ross in an able dissenting opinion rejected the majority's conclusion that the contempt was not proven. Although the manner in which he analyzed the evidence as supporting his conclusion that the respondent was guilty is a tribute to his skill, the striking part of his opinion, to the student of his character and personality, is in the following paragraph:

> The next inquiry to be made is, whether the act charged against the respondent, if true, constitutes a contempt of court? This question cannot admit of any sort of doubt. No stream can be pure whose source is tainted. There can, therefore, be no greater or fouler blow at the administration of justice than for one to falsely and fraudulently pretend and undertake, for a money consideration, and by means of a pretended influence with the judge, to procure a particular decision. Such a practice, if allowed to prevail, would destroy all confidence in courts, and sap the very foundation upon which society rests. It would therefore be a most fatal and dangerous interference with the administration of justice, and in every instance where it is shown should be visited with severe and summary punishment, not, as said by an English judge, for the sake of the judges as private individuals, but because they are channels through which justice is conveyed to the people.

Supremacy of the Law Over Other Considerations

A few years after he was appointed District Judge, a reign of terror swept the Pacific Coast in consequence of the Pullman strike in Chicago, in which Eugene V. Debs was the ringleader. In his instructions to the grand jury (*In re Grand Jury*, 62 Fed. 834), Judge Ross clearly and vigorously guided the grand jury to an indictment that resulted in the conviction of several of the conspirators. Their conviction was affirmed in *Clune* v. *United States*, 159 U. S.

590. After explaining that conspiracy to obstruct the passage of mail was a crime under federal statutes, he upheld the dignity of the law in these forthright sentences:

> It is of the first importance that the law be in all things and at all times maintained. This is especially true in times like the present, when there seems to be abroad in the land a spirit of unrest, and, in many instances, a defiance of law and order. Every man should know, and must be made to know, that whatever wrongs and grievances exist, no matter in what quarter, can only be corrected through lawful means; for the great mass of the American people are law-loving and law-abiding, and will never tolerate any highhanded or unlawful attempt to correct wrongs, whether they be real or imaginary. It is true that ordinarily every man has the legal right to stop work and quit his employment whenever he chooses to do so, unless there be a contract that obliges him to continue for a definite time; but no man has a legal or moral right, while continuing in the employment of another, to refuse to do the work he is employed and engages to do; and where such refusal goes to the extent of violating a law of the United States it is the solemn duty of those charged with its administration to take every step requisite and necessary to its complete vindication.

There are some today, who would, no doubt, condemn these instructions to the grand jury as an unwarranted interference with the right to strike. Yet how would these same individuals view Judge Ross' decision in *Gandolfo* v. *Hartman*, 49 Fed. 181? In that case one of the defendants had acquired real property under a deed which contained a restriction against leasing the property to Chinese. This defendant threatened to make such a lease to two Chinese, and suit was brought to enjoin him from so doing. Judge Ross dismissed the bill for injunction, holding that the Fourteenth Amendment to the Constitution of the United States prohibited the restriction in question, even though it arose through contract and was not imposed by the State. He swept away the plaintiff's argument that the Constitution's inhibition applied only to discriminatory State or municipal legislation, with the following words:

> It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear.[1]

It is safe to say that the critics of the Judge's instructions to the grand jury would applaud his striking down the covenants restricting the Chinese, particularly if they realized that a strong prejudice against the Chinese race existed in California in the early nineties. But such persons would also probably wonder how these two pronouncements, which they would no doubt characterize respectively as "reactionary" and "liberal," could have been made by the same jurist. The answer is that Judge Ross arrived at his decisions solely through legal reasoning, and that social, political and economic matters were always a secondary consideration.

Judge Ross and Proceedings as to "The Spoilers"

The cases of *Tornanse* v. *Melsing*, 106 Fed. 775, and *In re Noyes*, 121 Fed. 209, were the outgrowth of an illegal conspiracy to acquire certain valuable mining claims. The ringleaders in this enterprise were Arthur H. Noyes, who presided over the United States District Court for the Second Division of Alaska, and one Alexander McKenzie, whom he appointed receiver of the claims in question. The facts underlying this litigation are the basis of Rex Beach's novel, *The Spoilers*.

Noyes, who had just been appointed judge, and McKenzie, the receiver-to-be, arrived together at Nome. The order appointing the receiver and divesting the defendants of the possession of their properties was made without notice of any character, and in fact before any paper of any kind had been filed with the Court. Indeed, the order was made even before the steps required by statute for the organization of the Court had been taken, and therefore before the Court was in condition to transact business. Noyes denied the defendants' motions to vacate the orders appointing the receiver, refused to settle bills of exceptions, and denied the defendants' several petitions for orders allowing their appeals.

Upon application by the defendants, Judge Morrow of the Circuit Court of Appeals at once granted the appeals, ordered a writ of *supersedeas* to issue in each case, and ordered the receiver to restore to the defendants the property he had taken from them under the orders appealed from. Copies of these orders were served upon McKenzie; he refused to comply with them. Contempt proceedings followed, with the result that McKenzie was held guilty and sentenced to six months' imprisonment in each case, the sentences to be served consecutively. Judge Ross wrote the opinion of the Circuit Court of Appeals, which was concurred in by Judges Gilbert and Morrow. In characterizing the receiver's conduct, he branded it as such that it "may be safely and fortunately said to have no parallel in the jurisprudence of this country."

Expressing his insistence that the processes of the law must always be complied with, he said, in *Tornanses* v. *Melsing*, quoting from a State Court decision:

> That it (the court) be made the plaything of whomsoever may choose to deride its judgments or its process, and ignore its existence and its acts, because the opinions of the judges and the judgments of the court may

(Continued on page 1243)

1. Judge Ross' decision in this case is still cited as persuasive authority. See McGovney: "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional," 33 *Calif. L. Rev.* 5, 7 (1945); and dissenting opinion of Judge Edgerton in *Hurd* v. *Hodge*, 162 F. (2d) 233, 240 (Ct. of App., D. of C.; decided May 26, 1947).

Message from Britain:

The Lord Chancellor's Address in Cleveland

■ In his address at the Annual Dinner of our Association in Cleveland on September 25, the Lord Chancellor of England faced and discussed the questions which he knew were in the minds of his auditors as to what has been taking place in his country under the Labor Government. With the skill of a trained advocate and forensic orator, he pleaded his case boldly and without apology. His picture was of a brave people who, "weary and perhaps rather disillusioned", cherish their traditions and hold fast to their ideals of liberty and law, yet are driven by the aftermath of their great sacrifices in war to try out what he termed a "planned economy". He evoked hearty applause by his forthright assertions that political considerations never enter into his selection of lawyers for the bench.

Because his address was an admirable demonstration of the art of after-dinner speaking on subjects of great moment, we publish it from the stenographic transcript, excising only a little of the bantering and pleasantries that could have point only in the mood of the occasion.

■ My first task—and I do it from my heart—is to thank you, Mr. Rix, and your gracious lady and your colleagues of the American Bar Association, for the splendid hospitality which you have extended to my wife and myself throughout our tour. I suppose it is not given to any man in this imperfect world to attain perfection, not even a lawyer [laughter]; but Mr. Rix, where you have fallen short of perfection I confess I do not know.

As for my friends of the Cleveland Bar Association, the Ohio Bar Association, Mr. Hostetler, Mr. Krieger and Mr. Hauxhurst—arriving as I did in one of the worst hurricanes of the year, it was, I thought, going to be an inhospitable reception; but the elements did their worst and yet they were quite incapable of overcoming the kindliness of the Cleveland and Ohio Bar Associations.

You, Mr. President, have brought us over thousands of miles. We had a very difficult program to arrange. We had to fit into difficult time schedules, and we had to think them all out in advance. I add one other name: If it had not been for the efficiency and kindliness and the consideration of Mrs. Ricker, I simply do not know how we would have got on at all [applause]. Wherever we have gone, my wife and I have encountered the same bounteous kindliness and been enveloped by the same generosity.

You know, it is rather an achievement for the Lord Chancellor to be able to leave his own country at all. Amongst his other duties, he is the Keeper of the Great Seal, and one of the traditions is that he must never travel without the Great Seal, and the Great Seal cannot go abroad. Therefore, the Lord chancellor cannot go abroad save with the express permission of His Majesty, the King. When I told His Majesty what I proposed to do and where I proposed to go, he not only gave me his permission but said that he desired me to go. [Applause]

I will confess that it is a relief to leave my country for a short time, for I have not done it since 1939. My friend, A. P. Herbert, of poetical fame, has penned some lines about me. I used to live in the southeast of England, near Dover and Folkstone which, as you probably know, are Channel ports; and on a clear day you can see the French coast. This is what he wrote apropos of the fact that I could not go abroad:

> When oft upon the lonely shore
> Men see the sad-eyed Chancellor,
> At Folkstone or at Dover,
> Astride of some convenient groin
> He looks with longing at Burloyne
> As cattle do at clover. [Laughter]

It is seventeen years since I was last in America, when I had the great honor that you have conferred upon my friend and colleague, Mr. Justice McRuer, tonight—the honorary membership in your Bar Association. Of course I realize that this great welcome which you have given us here is a welcome to the bench and Bar of my country. I think it goes even further than that; I think it is a welcome and a sign of friendship to my countrymen as a whole. [Applause]

As for your country, the magni-

tude of its vast territories, its great resources, the potentiality of its development, have made me feel like the Queen of Sheba: "Behold the half was not told me!" But thanks to your generous hospitality, there have been occasions when I could not say with the Queen of Sheba: "Behold there is no spirit in me". [Laughter]

Sir, I have listened to the flow of oratory of distinguished lawyers from the Atlantic to the Pacific; and, sir, I have heard a flow of oratory compared to which even your greatest river, even the Mississippi, is a mere inconsequential trickle. [Laughter]

A Message from the Bar and People of Britain

It is my duty to you to deliver from the bench and Bar of my people, and from the British people as a whole, a message of regard and affection which springs from the fact that we have common memories and traditions of the past, and common hopes and common ambitions for the future. We share the same Common Law. We desire together the well-being of the common man, and we recognize that freedom is a prerequisite of that happiness.

We have a common dislike of bullying and aggression, and of the danger to freedom which we see around us. We desire that every nation shall be free to work out her own destiny on her own lines, and we want no one to interfere with any nation in working out that destiny.

We cannot accept the idea that the common man was made to serve the state; rather do we believe that the state was made to serve the common man. [Applause] Any other conception would tend to crush the individuality of man, to reduce him to the level of an ant in an ant heap, when he is told what he is to do, and to deny the fact that he was made in the image of God. We refuse to accept this conception of the state as a modern Moloch. Whilst we are prepared to render unto Caesar the things that are Caesar's, we both wish to render unto God the things that are God's.

Mr. Rix, as a result of my visit here I am quite confident that we two peoples must get to know each other better. I believe that there is great scope for doing that through the agency of the American Bar Association. I would welcome profoundly the opportunity of seeing representatives of your Bar Association over in England. I would like to show them exactly how we conduct our business. I would like to see them sitting on the bench with the judge and getting to know how we conduct our trials. And I would welcome any criticism they have to offer, for between our two people there is no "iron curtain," no curtain at all. And if this rationing system goes on, there will be no curtains anywhere. [Laughter and applause]

"Political" Remarks for "Internal Consumption" Could Cause Misunderstanding

There are some things which lead to misunderstanding. I went, when I was in San Francisco, to a most interesting discussion on the Taft-Hartley Act, and I heard quoted a sentence to the effect that the lessons of the Civil War had been undone, and that slavery had returned to the American continent. Well, that is the last thing in the world I would express any sort of opinion on, as to the merits or demerits of that controversy, but I should imagine that even the most perfervid partisan would realize that that particular sentence I have quoted is a slight exaggeration. [Laughter]

Well, now, such remarks, excellent headline material though they may be, are intended for internal consumption only. I have seen and I have heard statements that my country has gone or is going totalitarian, or will become a dictatorship. And for internal consumption, those remarks are admirable. [Laughter] Never let us have our politics in any way mealy-mouthed! [Laughter] But on the other hand, I venture to think that remark is just as foolish and just as exaggerated as to say that slavery has returned to the American continent.

The Rule of Law Firmly Entrenched in Britain

Never has there been a time when the rule of law has been more firmly entrenched in my country. Never has there been a time when the acts of the Executive are more completely subject to the opinions of an entirely independent judiciary.

I count it a great honor that in this last session of Parliament I was able to introduce a Bill which became an Act, called the Crown Proceedings Act, which has finally put to rest the doctrine coming from the feudal days in my country that the Crown can do no wrong, which meant to say that in matters of contract or in matters of tort, the subject had no absolute right to sue the Crown. Now, thanks to the passage of this Act last session, the subject is entitled to sue the Crown by any ordinary proceeding, whether in the High Court or in the County Court, just exactly in the same way as he can sue any other individual or any great corporation. [Applause]

All the old learning about petition of rights, all the distinction between contracts and torts which has prevailed for the last five hundred years, has gone. All the old learning about Latin informations and English informations, and all the rest of it, has gone. That is one of the few bits of the feudal system which we still had to remove.

Legal Aid at Government Expense Will Be Operated by the Bar

And in the next session of Parliament I have given notice of my intention to introduce the Bill to carry out the Rushcliffe report on legal aid, whereby what corresponds to your Bar Association—no government agency at all—will have the right to investigate cases, and if they think any man has a good case, whether it be against his neighbor or against the Executive, they can assist him out of public funds to bring his action.

Can you imagine Hitler or any other totalitarian leader providing public funds for the citizens to bring actions against the Executive? And I ask you, are these steps on the road

to totalitarianism, or are they, on the other hand, a recognition that the Executive, just as every other institution in our country, must be subject to the rule of law?

It is a fact that we have taken power to promulgate regulations to get us out of our troubles, and that power lasts for the next three years. But what you people do not seem to realize is this, that any regulation we may issue is subject to Parliamentary approval, and either House of Parliament—the House of Commons in which the present Government is in a great majority or the House of Lords in which the present Government is in a great minority—may by simple prayer render that regulation inoperative.

Differences in Conditions Between England and America

But, sir, since I have been in your country I have received from various newspapers advice. [Laughter] I am told that what I ought to do is to take the next boat back to my country and advise my country promptly to accept a written Constitution. The trouble about that advice is that there is not a single person in my country of any party who would accept such a suggestion for a moment. Why, then, is the advice made?

Sir, when Dr. Johnson was once asked to explain why he had wrongly defined the word "spavin," he answered: "Ignorance, Madam, sheer ignorance." [Laughter] Possibly the same explanation might be given. [Laughter] If I were to advise you to abandon your written Constitution and adopt our method, I should equally be guilty of "ignorance, sheer ignorance."

The long and short of the matter is this—and I want you, if you will, always to remember it: Our circumstances are so wholly different, that what may be right for us may be wrong for you, and vice versa. Our country is a very small one. England is approximately the size of New York State. The whole British Isles are smaller than your State of Oregon or your State of Wyoming, and about one-third of the size of Texas. And in those Islands we have got a comparatively homogeneous population. I can say that frankly. My wife is a Scot; I am an Englishman. You may realize we were conquered by the Scots these many years ago. [Laughter] I am now looking forward to being conquered by the Irish. Then the Welsh can have their turn, and we will all live happily ever afterward. [Laughter]

The British Live on Many of Their Traditions

Not only are we homogeneous, but if you want to fathom the secret of our character, it is that we live on our traditions. We have not thought out a system and said: "This is a good, logical system. Let's apply it." We have inherited a system from our ancestors, and we have found out how we should modify it, whether in this respect or that. But broadly speaking, we have carried on the old system.

Let me give you some illustrations. In the Temple we still sound the horn to summon people to their dinner in the evening. We sound it down by the River bank, so that those who are practicing their archery or hunting on the other side of the river may give up and come in to dinner.

When, as I frequently have to do, I want to summon the faithful Commons to my House, I send an official called Black Rod. I tell him to go and summon the faithful Commons, and he walks along until he gets near the door of the House of Commons, and then the door is banged in his face. We keep a special man to bang the door! [Laughter]

Then Black Rod has humbly to knock three times and ask for admission. Then they graciously open the door, and they let him advance to the Speaker and tell the Speaker that their Lordships require the presence of the faithful Commons, and the faithful Commons then go.

The House of Commons Formalizes Its Historic Independence of King and Ministers

If it is on the occasion of the opening of Parliament, the King's speech is read by His Majesty. The speech, of course, is written by his Ministers. They hear the speech. In that speech the King, or rather the Ministers, tells them what they ought to do, and they go back to their own House. Directly after the King's speech is formally read to them for a second time, somebody gets up and moves that the Outlawry Bill be now read.

No one knows what it is, but the point of it is this: The Commons are saying, "We are not going to take our orders from the King or anybody else. We will assert our rights, if we want to, now to consider the Outlawry Bill before we have any regard whatever to the Royal Message." [Laughter]

And when an Act is passed by both Houses of Parliament, before it can become an Act the Royal Assent has to be given; and I, in the House of Lords, standing up in all my robes, have to indicate that the King gives his consent to this Act.

And we still use the Norman French. We say: *Le Roi le veut.* But supposing he did not give his consent? The formula is: *Le Roi s'avisera.* The last time that was said was in the early days of Queen Anne.

We keep up those traditions. We like them. We all like them. They do no one any harm. But you must not judge us from any normal standpoint at all. [Laughter]

Reasons Why England Is Trying Out a Planned Economy

You know, there are very few men who can understand the politics of their own country. [Laughter] Possibly John Foster does. I don't. [Laughter] There is no man who can understand the politics of any other country, and the wise man is the man who does not try. I, so far as I do understand them, am quite certain that, rightly or wrongly, the people of my country are determined to try out a planned economy. It may fail. It may succeed. You ought to be very glad we are trying for you. [Laughter and applause] Perhaps you will follow us. Perhaps you won't. But it is quite obvious that no government could last a day in my country at the present time unless they were prepared to try.

I look at it like this, and I am half in and half out of politics. I believe the wise course of statesmanship today at home is not to oppose any unyielding dam to the flood waters which have arisen, but rather to try to so canalize those flood waters that they irrigate the arid places, and do not destroy our ancient and previous landmarks.

And I believe that the greatest task for the statesman and political thinker today is to try to work out some synthesis between individual freedom which, at least in its self-regarding aspects, if I may use Mill's phrase, must be absolute and unqualified, with that control which is inevitable if we are going efficiently to tackle the tremendous problems which confront us today.

Three-Fold Aspects of the Lord Chancellor's Duties

Mr. President, ladies and gentlemen, if you remember your classics (and I will spare you Latin quotations) you will remember that Cerberus, the hound of hell, had three heads, and you will remember that he could bark from each of them. I, too, have three heads or aspects of my activities. I am a judge. I am the highest judge in my country, and in that respect I correspond to Chief Justice Vinson.

I am a member of the legislature. I am Speaker of the House of Lords. That also is a most extraordinary assembly, I suppose the only assembly in the world where the son succeeds the father because he is the son. As somebody once said: "Maternity is a matter of fact. Paternity is a matter of opinion." [Laughter]

And the woolsack on which I sit—it is not a very comfortable seat, and I might add until recently was stuffed with horsehair—is not technically in the House. When I sit on the woolsack I am not in the House. If I take one step to the left, I can then deliver a violent political speech.

Then I am also a member of the Executive. I am a member of the Cabinet, and I am senior member, because such is the respect which my people pay to law and order that I am the second of His Majesty's subjects, ranking next, and next only, to the Archbishop of Canterbury. And Prime Ministers, and such as they, are mere chicken-food! [Laughter]

The Lord Chancellor Has To Appoint All of the Judges

I confess to you I think I perform the most important task of all, for I have to appoint the judges. I have to appoint the justices of the peace. I appoint them and I can remove them. I have to appoint the County Court judges who have jurisdiction up to about £200. Then I have to appoint the judges of the High Court. I can appoint them, but I cannot remove them. They can only be removed by address of both Houses of Parliament presented to the King; and students of our history will be able to tell you, perhaps, when that was last done, but I should suppose it has not been done for the last 200 years—certainly not within the memory of any living man.

Well, now, sir, that is my duty. So long as I am honest in carrying out that duty, I am in the best position of anybody to carry it out, because, as you know, we separate the two branches of the profession, the solicitors from the barristers—the Court lawyers, I think you would call them—and, it being a small country, all our prominent trial lawyers are concentrated in London. I sit and hear cases, and hear these fellows perform. I am able to tell whether this fellow is competent, whether that one isn't, whether this man has a clear mind, and so on.

Political Considerations Have Never Entered into the Selection of Judges

Before appointing a judge I always talk it over with my brother judges, and in that way I am able to tell you—and no one in my country will deny it for a moment—that I have never let political considerations weigh with me to the slightest degree in trying to get the fittest man. [Applause]

I have never appointed, incidentally, a member of my own Party. I have appointed several members of the Opposition, not because they were members of the Opposition—God forbid!—[laughter] but because I thought they were the fittest men for the job.

And I have never appointed a judge without getting the willing approval and concurrence of my brother judges who sit in and staff the particular division to which I am going to appoint this judge. And when he is appointed he is completely beyond my control.

For the broad administration of justice, not only do you want an impartial and independent judge (and, may I add, incidentally, of course we live in a much cooler climate), but I believe there is something to be said for the fact that our ancestors had some wisdom in giving the judges these robes, and the like.

The Robes and Wigs of Judges Have Desirable Effects

I believe that when they go 'round on their circuit and deal with criminals, the Red Judge, as he is popularly known because he wears his red robe, wears his wig (which is devilishly hot in hot weather), and has an effect not only on the criminal but also, I believe, on the man himself. There he is, robing himself in these robes. He ceases to be an ordinary being and becomes that extraordinary being, a judge. And I believe that to be of some value.

But, sir, my experience is now so considerable that I can say that a judge cannot function as a judge unless he has a free, independent and fearless Bar who fight for their clients, but fight with the weapons of the soldier and not with the weapons of the assassin. [Applause]

I believe there is one other essential condition for the proper administration of justice. I believe that everything must be done in the full light of day; that means to say, open to the press, open to the public, so that everyone knows what is going on. And although we do not allow in our country the slightest mention in the press of anything except what takes place in open Court (you can-

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Chief Justice Bolitha J. Laws:

U. S. District Court for the District of Columbia

■ The District Court of the United States for the District of Columbia differs from other District Courts in that in addition to its federal jurisdiction it is also the general trial Court for all manner of non-federal cases arising in the District of Columbia. The Court also has a Chief Justice, and the incumbent is the subject of this sketch.

The Associate Justices of the Court are: Jennings Bailey, James M. Proctor, F. Dickinson Letts, T. Alan Goldsborough, James W. Morris, David A. Pine, Matthew F. McGuire, Henry A. Schweinhaut, Alexander Holtzoff, Richmond B. Keech, and Edward M. Curran.

The three retired Justices (28 USCA §375) are: Wendell P. Stafford, Jesse C. Adkins, and Daniel W. O'Donoghue.

■ Bolitha James Laws was born in the District of Columbia on August 22, 1891. His parents were gentle Virginia folk who had moved to Washington in pursuit of his father's occupation. The senior Laws was an architect by profession and an artist by nature, associated with the Veerhoff Art Galleries. What proved to be his last undertaking was the decoration of the White House just before the turn of the century. He died in January of 1900, when his boy was nine years old.

We shall omit much, particularly names and dates, in this sketch. One could occupy the full allotted space with a mere compilation of jobs done and honors received by the subject person. But, to those who know him, such a recitation would be neither accurate nor complete. We shall attempt to depict by a factual recitation some facets of a character.

Young Laws went through grammar and high school in the public school system. Extra-curriculum at high school, he was a captain in the Cadet Corps and president of the graduating class. Thereafter began a long, persistent process of education in evening classes. From age sixteen he was the support of his mother and sister. Two years of night school were his pre-legal. Then came evening classes at Georgetown Law School for an LL.B. in 1913, and, doggedly, an LL.M. in 1914. He was an editor of the *Georgetown Law Journal* and is permanent secretary of his class.

A Lawyer-Judge Virtually Reared in a Courtroom

It is often said that Judge Laws was reared in Washington. It could be said with almost complete accuracy that he was reared in a courtroom. His first employment was as a stenographer in the District Attorney's office. Promotion kept pace with his education. When he came to the Bar, he was promptly made an Assistant United States Attorney, and rose to be assigned to trials of many of the chief criminal cases of that office. His most famous prosecution in those days was in the murder at the Chinese Educational Mission in 1919. Resigned from office, he practiced for a year in New York City, then did brief service in the federal government as Assistant General Counsel to the Shipping Board, and in 1922, with Paul B. Cromelin, he formed a firm which quickly and permanently became one of the leaders in the general practice of law in Washington. He was in private practice for some twenty years.

During those years, Judge Laws was for nine years a member of the Grievance Committee of the District Court, and for five years was its chairman. He was treasurer of the District of Columbia Bar Association, its vice president, and then its president. He became a member of the American Bar Association in 1926. For years recently he has been chairman of the Committee organized in the District of Columbia to work with our Association's Committee on Improving the Administration of Justice. He is a valued member of the Advisory Board of the JOURNAL and has contributed several signed editorials. (See 33 A.B.A.J. 254 and 1022; March and October, 1947).

Judge Laws' Civic Service and His Hobby

In civic affairs, he has been the recipient of the annual awards for out-

standing public service by The Society of Natives of the District of Columbia, the Washington Federation of Churches, and the Council of Social Agencies. He is a past Master of his Masonic Lodge and past President of the Worshipful Masters Association.

Since 1932 he has taught the Men's Bible Class, of some 200 members, at Mt. Vernon Methodist Church, a great metropolitan church in downtown Washington. To his friends this is one of Bo's most-discussed characterisics. For fifteen years, no matter what else has been on his crowded schedule, no matter what ventures Saturday may have developed, 10 o'clock Sunday morning has found him in his place with a meticulously prepared thirty-minute address on the Sunday School topic of the day. He is also a steward of that church and until lately has served as a director in the Y.M.C.A.

There is no doubt or shadow of uncertainty about Judge Laws' hobby. He is a golf fiend. Although the restrictions of judicial duty have somewhat curbed by what had been an unrestrained and insatiable appetite in that respect, until he went on the bench no call had precedence over golf. It was commonly understood by his friends that one never asked Bo whether he would play; one merely mentioned a time and place and proceeded upon the certainty that at least one competitor would be there. On the course he is the same vivid figure that he is elsewhere. His boon companion there, Clarence M. Charest, former General Counsel to the Bureau of Internal Revenue, once wrote of him, in a New Year's jingle:

> Best wishes to Bolitha Laws,
> I'm fond of you, old friend, because
> On days that I am putting well,
> You yip with such a stricken yell.

In 1920 he married Miss Nancy MacLeod, of Lynchburg, Virginia. They have four children, Nancy Lee, Ileita Margaret, Mary Elizabeth, and Bolitha James, III. If books were written about families which live as an integrated unit, in laughing camaraderie, in mutual affection without veneer, in unceremonious friendliness, one could be written about this family. Their permanent residence is in suburban Maryland, and for summertime they have a farm, Hillside Hobby, in the Blue Ridge country in Virginia.

Appointed to U. S. District Court; Later Named as Chief Justice

While Judge Laws was president of the Bar Association, a vacancy arose in the District Court. The Association's Committee on Judicial Selection would have included his name in their recommendations, but on grounds of propriety, he refused to permit it, he having designated the Committee. When the group called upon the Attorney General, they felt in honesty compelled to say that one name which would otherwise have been on the list was not there. Intrigued, Mr. Cummings made independent inquiry about this lawyer. So in June of 1938, President Roosevelt nominated, and the Senate confirmed, Bo Laws as a District Judge.

In 1943, when the present Chief Justice of the United States retired from the United States Emergency Court of Appeals, Judge Laws was appointed to that bench. And in January of 1945, upon the death of Judge Eicher, Judge Laws was named as Chief Justice of the District Court. For non-residents of the District, it should be noted that this Court is not only a federal District Court with the jurisdiction usual in such Courts, but is also the Court of general trial jurisdiction in the District of Columbia. Its twelve judges sit in every known variety of litigation, from uncontested divorce suits to anti-trust injunction proceedings, from assault to treason. Almost 10,000 cases were filed there during the last fiscal year.

His Aggressive Efforts to Improve the Administration of Justice

Present interest in Judge Laws centers, of course, about his activities on the bench. He has been there the same human dynamo that he has always been, the same aggressive proponent of improvement in the administration of justice.

At the end of his first year as a judge, his brethren chose him to inquire into the newly-designed pre-trial procedure. During the summer he visited Detroit and Boston upon that assignment. He became a convert, and then an evangelist. The procedure was instituted in his Court, and he was assigned as the first pre-trial justice.

Thus to him fell the opportunity to organize the work and to set its precedents. At the end of the year, Chief Justice Hughes had the following to say in the report of the Conference of Senior Circuit Judges: "In the District Court for the District of Columbia notable gains have been made during the past year in clearing up a highly congested calendar and the Director reports that if a similar degree of progress is made during the next year the docket will soon become current. Most of that reduction has been occasioned by an intelligent and skillful use of the pre-trial procedure permitted by the Rules of Civil Procedure." Since then, Judge Laws has spoken in many States, to many organizations of the bench and Bar, and has written in many periodicals upon the pre-trial theory and practice. He is one of its outstanding proponents.

On his own bench Judge Laws' next assignment was in the Motions Court, where the daily grist includes so much of domestic relations litigation. That summer, by designation of his brethren, he again visited other jurisdictions in a study of procedure in domestic relations cases. The result was his advocacy of a Domestic Relations Commissioner in the District Court and the establishment of that office. After several years of experience, that procedure was brought into sharp focus by vigorous debate at the Judicial Conference of judges and lawyers in this jurisdiction this summer. The statistics upon the results of the system were conclusive, and a show of hands at the close of the debate was overwhelming in approval.

When he came to the presiding judgeship, an immediate concern was

the state of the criminal calendar. Analysis indicated several sources of difficulty. Amendments to the rules were promulgated, and a new system of assignment of criminal cases for trial was inaugurated. The Chief Justice himself hears a call of the criminal calendar at 9:30 o'clock on Monday mornings and lays out the schedule of assignments. After a period of experience, this arrangement was also placed before the Judicial Conference for debate by the participating lawyers and judges. Again the statistics were conclusive, and again the show of hands was overwhelming in approbation.

Judge Laws Seeks a New Building for His Court

A more material, and perhaps even more critical, need of the Court when Judge Laws became its chief, was a building. The judges and the various offices auxiliary to the Court are scattered throughout several buildings. Witnesses, litigants and jurors must crowd the corridors for lack of room. Filing space and conference space are practically non-existent. The courthouse, one of the real architectural gems in a city of such gems, was built to house a Court a fraction of the size of the present organization, when Washington was a small town instead of a great metropolis. The situation has been publicly described as a national disgrace.

Judge Laws promptly joined those judges, lawyers and local citizens who were attempting to secure a new building. In the District of Columbia that is a complex undertaking. Congress, chiefly through its Committees, rules the District in legislative matters, and Congressmen are not initially familiar with District affairs. The executive powers are in part in the Board of Commissioners and in part in various Departments of the Federal Government. For example, the present Judiciary Square is under the control of the Interior Department, the courthouse itself is in the care of the Department of Justice, the new land wanted is owned by the District of Columbia, the plans for the new building are under the supervision of the Architect of the Capitol, and the cost must be met in part from local taxes and in part from federal funds, which gives the Treasury Department a voice. Judge Laws, in his position as Chief Justice, became the spearhead of the effort. As a result of many months of concentrated attention, all interested were finally brought together into one program, Congress authorized the project, and the building plans for a modern and commodious home for the Court are now under way.

His Program for the Participation of Non-Lawyers in Improving Work of Courts

Two more major projects, which are peculiarly and almost entirely Judge Laws', need to be mentioned. His long acquaintance with the practical aspects of litigation taught him the importance of the participation of laymen, outside the bench and Bar, in the processes of the Courts. He undertook to formulate a program with that in view. He believes, and says vigorously: (1) That, after all, laymen are the litigants, the witnesses and the jurors and thus have as great interest and part in legal procedure as have the judges and the lawyers; (2) That the public estimate of the administration of justice, upon which the well-being of the Courts, and of our legal system itself, depends, is the opinion of laymen, and that opinion should be an informed one; and (3) That laymen have many skills at organization and mass procedure that the bench and the Bar do not necessarily have or experience.

He began by adding laymen to his Committee on Improving the Administration of Justice. Then he procured a place on the program of the Judicial Conference of his Circuit for a lay speaker. Three eminently successful addresses have been delivered at this Conference by prominent laymen—one a banker and the other two a newspaper editor and a newspaper publisher. Next he began to write and speak upon the subject. It was largely at his instance that a layman addressed our Association at its recent Annual Meeting. He is still at work on advancing and perfecting this idea.

The latest undertaking of the Chief Justice sprang from an experience he had on the bench in a case. He sat in the criminal trial of a newly-returned veteran of the war. His observation of the defendant led him to a conviction that the Courts owe these men the highest degree of care in disposing of charges made against them in their post-war life. He instituted an inquiry into the consequences of war experience upon a young man's mental and emotional make-up. He wrote an editorial on the subject for the March (1947) issue of this JOURNAL (page 254). The point was made in these words: "He may be a villain; and in such case, the mere fact that he is a veteran should not deter just punishment. But if fair investigation indicates that the commission of wrong by a veteran is reasonably traceable to or can be associated in some manner with his harrowing experiences in fighting for his country, the case demands special treatment." This program is still under Judge Laws' insistence.

The Diligent Dispatch of Business in His Court

In the midst of all these special projects Judge Laws has continued his share of the regular work of his own Court and of the Emergency Court of Appeals. In the latter capacity he has sat in every section of the United States. His opinions reflect careful deliberation and a fine grasp of the intricacies of the economic and legal problems presented by national wartime price control.

The administrative ability of the Chief Justice and the diligence of his associates are reflected in the state of the calendar of the District Court. In the last fiscal year that Court disposed of 9555 cases. Of civil cases pending at the end of the year, only about one-fourth are more than six months old, and of the older cases more than one-half

were divorce actions. On the criminal side, only 169 cases were available for trial on July 1, 1947, and of these only five were more than six months old.

On the trial bench Judge Laws acts with the complete assurance of a man at home in the courtroom and one with a varied personal experience in the affairs of life. He himself has been both poor and prosperous; he has both prosecuted and defended; he has conducted trials, argued appeals, and advised corporate clients in his office. He has served both the Government and private persons as counsel. One of the most gregarious and fun-loving of men, he never loses an innate dignity which prevents presumption even in the most informal circumstances.

These few circumstances and events are sketched as the lines and colors of a picture of a man on the bench. We have not attempted to merge them into a summary unit. If the sentences and paragraphs do not blend into a single portrait, they have failed of their purpose. The recitals are not intended to suggest Judge Laws as a unique or solitary devotee of progress in legal affairs in his jurisdiction, or even to intimate a comparative evaluation of his contributions. Indeed, he would not have it so. Many of both this Bar and bench have devoted their thought and energy without stint and with major results, to the same cause. But by unanimous opinion Bo Laws is a forceful leader of both the Bar and the bench, nationally as well as locally, and is fully equipped for such leadership. He is a first-rate judge because he was first a thoroughly experienced and altogether human lawyer, with a persistent common sense and spirit of fairness.

Here is a strong man of pleasant personality, at once a scholar and a sportsman, of inexhaustible energy, of complete familiarity with the processes and the problems of justice, with character and mind forged in the classic American tradition from difficult economic beginnings, with a complete sense of independence and courage and impartiality in handling the most difficult situations, with superb confidence in the eventual achievements of law, and with a zestful enjoyment in his own participation in it. This man is a rare combination of skills as lawyer, trial judge, student and administrator. In these days of concern over the judicial office, contemplation of this incumbent is a timely reassurance to the Bar and to the public generally. So long as the bench can attract and hold such men as Bo Laws, neither the community nor the Bar need be disturbed about the strength of the foundation of the American system.

A New Means of Post-Admission Education for Lawyers Is Established

■ A new expedient or device for assisting New York lawyers to "keep up with the law" as a part of their continuing post-admission-"education" was offered on November 20 by the faculty of the New York University School of Law. The October issue of the *Law Quarterly Review* (Vov. XXII, No. 4; pages xliv, 954) of that school is devoted to the first issue of an *Annual Survey of New York Law (1946-47)*. The editor is Professor Alison Reppy; the sponsor and guiding spirit in this further effort to make the law school of service to the practicing profession is Dean Arthur T. Vanderbilt, recently appointed and confirmed as Chief Justice of New Jersey under that State's new Constitution.

As far as feasible, the articles in the survey of developments in the law of New York follow the sequence of the fifty-two articles comprising the *Annual Survey of American Law*, which is currently being reviewed by Dean Roscoe Pound. The treatment in the New York compilation is less selective and more comprehensive, both as to statutes and decisions. Even in a single State, however, it is impracticable to deal encyclopedically with 1192 pages of statutes and, counting official and unofficial reports and law journals, 10,901 pages of decisions and 4574 pages of discussions. Cases in the federal Courts in New York State are not covered. Twelve months from June 1 to May 31, rather than a calendar year, are taken as the period, to permit the summer vacation months to be utilized. Decisions and statutes are not merely digested; they are analyzed, commented on, and put in their proper perspective. (Address: New York University Law Quarterly Review, Washington Square East, New York, N. Y.; price for a single copy: $2.00).

The hopes of the sponsors of the new project are not limited to practical assistance to members of the Bar in New York State in keeping abreast of the changes in the law applicable to their principal work for clients. Dean Vanderbilt and his associates believe that their plan may commend itself to other law schools and lead them to launch similar projects in their respective States, as an important and useful contribution to the "continuing education of the Bar". Several law schools and law reviews have already done at times something generally similar, particularly in the way of "refresher" material for lawyer-veterans and others. New York University Law School has now, for the lawyers of New York State, given the idea a permanent form as a definitive institution, an *Annual Survey of New York Law*.

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Association Year 1946–1947:

Progress Under Leadership of President Rix

by **William L. Ransom** • Editor-in-Chief of the *Journal*

■ In business and institutions, the close of a year is a traditional time for taking stock and for looking over what has been done during the period ended. Our Association year 1946-47 came to its close on September 26, when Retiring President Carl B. Rix handed the historic gavel to Incoming President Tappan Gregory and the latter declared the 1947 Annual Meeting to be adjourned. Our first issue prepared after the ending of the Association year 1946-47 accordingly is an appropriate time to bring together and look at the record for the year, to note the accomplishments and the trends, and to give the background for the "induction statement" by President Gregory when he took office (October issue, page 971).

The Association year just ended will long be remembered as the first after the hostilities in World War II ended and the "peace" brought problems more perplexing and perilous than those of the war years. In the work of our Association, 1946-47 will be recalled as withal a good year, a time of marked upsurge in interest and spirit, a period during which lawyers became more aware of what their Association does for their country and for the profession of law. Organizationally, the period was difficult because of the pressures, in our Association and in State and local organizations, for new work for which neither staffs nor funds were fully available. The organized Bar seemed at times to be "bursting at its seams"; tasks of selection and coordination remain, along with many-sided work.

■ The work of our Association in any year is necessarily the product of a "team". Upwards of a thousand men and women have an active and responsible part in it at some stage or stages, in the House of Delegates, the Board of Governors, the numerous Committees, the Sections and their Councils and Committees, etc., as well as in meetings of the Assembly and the Sections, with members of the full-time staff at Headquarters and in our Washington office rendering devoted assistance throughout the year. Nevertheless, the actual administration and leadership of the Association are headed up by its four officers—the President, Chairman of the House of Delegates, Treasurer, and Secretary—and the President in office during a year is the conspicuous spokesman of the determined objectives for the year. Relatively few of those who do substantial amounts of painstaking and diligent work at sacrifice of leisure receive recognition or mention for it at the time. Their reward is necessarily the consciousness of duty well performed as to work that is important for the public and their profession.

When a President of our Association relinquishes his office and returns to the ranks except for a year's titular status as Last Retiring President, it seems fitting to record in the JOURNAL some summary and appreciation of his contribution and of what the "team" has done under his guidance.

The Travels of a Hard-Working President

Our seventieth President, Carl B. Rix, of Wisconsin, our first President from that State, gave his utmost to the work during the eleven months he was in office following the adjournment of the 1946 meeting in Atlantic City. He travelled about 75,000 miles, mostly by air, to carry the message of our Association, and fulfilled about seventy-five speaking engagements—seventeen at State Bar Associations, twenty-four at local Bar Associations, eight at gatherings of the American Bar Association or under its auspices, and the rest at miscellaneous assemblages, including a medical association, a trade association and lay organizations.

His travels took him to Havana, Cuba, for the meeting of the Inter-American Academy of International and Comparative Law, and to Ottawa, Ontario, for the annual meeting of the Canadian Bar Association. The Board of Governors met four times during his year, each time for sessions lasting several days; and there was the usual meeting of Section Chairmen to start the year.

Increase in Dues Did Not Decrease Membership

Organizationally, the principal accomplishment of the year was the too-long delayed increase in Association dues from $8 to $12 a year (with corresponding increase for the

young lawyers). This raising of the dues was necessitated by both the expanded work in many fields and the sharply increased costs of printing, paper, office equipment, repairs, supplies, transportation, etc., as well as the increased costs of living and the need for increasing the salaries of our devoted staff at the Chicago Headquarters and the Washington office.

The increase voted by the House of Delegates could not be made effective until the dues notices went out as of July 1. The imperative reasons for the increase were carefully explained to our membership in the leading article in the April issue of the JOURNAL (33 A.B.A.J. 299): "Higher Costs and Bigger Duties." With our members themselves beset by extortionate taxes, high costs of living, and increased office expenses, it was reasonably expected that retrenchment would force a substantial number of members to feel that they could not afford to pay the increased dues for the support of the Association's many-sided work.

Happily, the fears or forebodings in this respect did not come true. Many members did feel that they could ill afford the increase, but the number who dropped their membership was much less than had been prudently estimated. The Association's net membership continued to gain, as the importance of its work was increasingly realized by lawyers.

As of October 1, 1946, the total number of members in good standing was 38,553. As of October 1, 1947, the number had risen to 40,190, an overall increase of 2357 during the twelve months. Thus the increase in dues was accomplished, and the Association's membership rose meanwhile to its all-time high.

In retrospect, the 50 per cent increase to $12 seems now to have been very moderate, as compared with the value of the work done for our country and our profession, and as compared with other increases with which our members are familiar. One dollar per month is obviously less than a member should feel that he can well afford to pay, for such work as the Association does in his behalf and for independent Courts and an independent, outspoken profession in our country. If anyone doubts this, let him ask himself how much the lawyers in countries where those institutions of freedom have been destroyed would be willing to pay for the support of like efforts in their behalf.

The Reporting of Work to the Membership

Perhaps the most significant phenomenon of 1946-47, which has had substantial effects on Bar Association work throughout the country, may be stated in this way: There is a strong and prevalent impression that our Association, and most of the State and local Bar Associations, are doing very much more work than they ever did before. That is true of many State and local Associations; and there has been a marked increase in the number, scope and vigor of our Association's activities.

But the principal change has been that the nature and worth of the work has been brought more extensively and more frequently to the attention of our members, and the conditions and dangers inherent in the times has given them a keener interest in it and an added appreciation of its importance. Many very useful things which our Association did, and did well, in other years, had been virtually unnoticed and unknown to the great majority of our members. Under President Rix the story has been carried to the rank and file of our membership as never before. One incidental result has been that the work of our Association has been cited, quoted and discussed, in reports by Committees in State and local Bar Associations, as it should be.

New and vital projects have been undertaken in 1946-47, but it would be unfair to the diligent predecessors of retiring President Rix to leave the impression that the activities of which our members have become aware are chiefly new or that the constructive planning and carrying forward has taken place within the Association year lately ended. The impression is now, as it should be, of *continuity* of the objectives and work. A President is in office for a year; each President makes his contribution, his own record of accomplishments and omissions; but the work of the Association has a unity and momentum, which carry on and accumulate from year to year, and are due to the unheralded work of the uncounted lawyers in many posts.

At this point permit me to say that during nearly thirty-five years I have seen Presidents of our Association come and go. The first meeting that I casually attended was not held in the United States; I doubt if I bothered to register before 1921 in Cincinnati; and I certainly did not "register" in any other way until years after that. Some men who should have been among our best Presidents in fact did little beyond making a few addresses; some of our most effective Presidents have been "country lawyers" or small city lawyers whose experience in national leadership and administrative tasks had been slight. Comparisons would mean little unless conditions could also be compared, and would serve no useful purpose anyway. To undertake an objective appraisal of our most recent year is venturesome, but an enumeration of some of the matters advanced during it may assist readers in forming their own evaluation.

Some "High-lights" of the Association Year 1946-47

Space permits little more than a listing of some of the salient developments under the leadership of President Carl B. Rix, to supplement those already mentioned. Details of practically all of these were currently reported in the JOURNAL. The following enumeration does not purport to put them in any sequence of their worth or significance:

1. The plans for the Survey of the Legal Profession were made, a Council was selected, and the work was begun. (See 33 A.B.A.J. 326, April, 1947; 33 A.B.A.J. 423, May, 1947; 33 A.B.A.J. 653, July, 1947; 33 A.B.A.J. 1075, November, 1947).

2. The functioning and accomplishment of our Association's Committee on the Judiciary, as to appointments and confirmations to federal judicial office. (See particularly our September issue, page 895). Sound and effective work in this field depends on effective coordination and cooperation with State and local Bar Associations. Our Committee can make competent and unbiased information and judgment available, but could not become any "pooh-bah" of judicial selections. The cooperative relations established during the year, with the Senate and House Committees on the Judiciary, have been of great usefulness in many matters important to lawyers and the public. Non-partisan and non-political selections for the judiciary may come to pass. (See the editorial on page 1118 of the November issue: "I Have Never Appointed a Member of My Own Party to the Bench").

3. A Committee on the American Federal System of Government was created for the first time. (See 33 A.B.A.J. 696; July, 1947). The 1948 competition for the Ross Essay Prize was put in that field (see the inside back cover of the November issue), and Senator McCarran's exploratory bill (S. 1156, set out on page 525 of our June issue) was approved in principle by the House of Delegates in Cleveland.

4. A great deal of attention throughout the year was given to international law, the United Nations, and the legal aspects of American foreign policy. An emphatic stand on specific questions was voted by the House of Delegates at each of its sessions (33 A.B.A.J. 236, March, 1947; 33 A.B.A.J. 400, April, 1947; 33 A.B.A.J. 1090, November, 1947). The Committee for Peace and Law Through United Nations has been cooperating actively with the United Nations, the Secretariat, and the Canadian Bar Association, as to international law. Nine of about forty-five Regional Group Conferences that had been planned, to be held in the United States and Canada, were conducted; the others were deferred because of Judge Hudson's illness, but have to be abandoned or curtailed in 1947-48 because of lack of funds. Throughout his year, President Rix stressed, in most of his addresses, the lawyers' responsibility as to international law and the World Court. In the opinion of objective observers, our Association has contributed much to the development of an informed, united and militant public opinion as to American foreign policy, as well as to elements of the policy itself.

5. A notable Committee or Council has been created, under President Rix's leadership, on Lawyers' Participation as Citizens in Public Affairs (see our November issue, page 1086), and the work of the Committee has been auspiciously launched.

6. The Committee on American Citizenship has had a useful year, and has broadened and intensified its work through cooperating as to the Freedom Train (see July, 1947, issue, page 714; October, 1947, issue, page 1019).

7. The Administrative Procedure Act, which became law in 1946, has been staunchly supported; efforts to sabotage it or whittle it away have been resisted. Efforts were made to effectuate the intent of the Act as to the caliber, qualifications and judicial temperament of the Hearing Examiners appointed under it. This effort has been frequently reported in the JOURNAL (see our January issue, pages 1-2; July issue, page 688; September issue, pages 861-863; November issue, page 1097). An Administrative Practitioners' Act has been drafted and introduced (see our April issue, page 307), and hearings are in progress to perfect it.

8. New and notable cooperation with the motion picture, newspaper and radio industries was established (July issue, pages 649-653). Progress is being made (October issue, page 1024).

9. Regional meetings of our Association were initiated, but the lack of funds led to a shift to trying out cooperative meetings with State and local Bar Associations, for which our Association supplies leading speakers and subjects. The Commerce Committee held a successful joint meeting with the committee of the Chicago Bar Association; the Section of Corporation, Banking and Mercantile Law conducted a worth-while meeting with the Bar Associations of Oregon, Washington State, Seattle and Portland. The Commerce Committee broadened its fields of study (see 33 A.B.A.J. 599, June, 1947; 33 A.B.A.J. 733, August, 1947).

10. The study and development of aviation law has been furthered, through clinics with the Milwaukee Bar Association and the District of Columbia Bar Association. (See, as to the Milwaukee meeting, 33 A.B.A.J. 797, August, 1947).

11. A definitive organization of Public Relations work has been initiated and is experimentally under way, with Charles B. Stephens as director (February issue, page 181).

12. Active efforts have continued to enlist the cooperation of non-lawyers in behalf of continuing improvement in the administration of justice (February issue, page 101).

13. Attention has been given to "refresher" courses for returned veterans and others, with the emphasis shifting to comprehensive plans for the continuing education of the Bar (February, 1947, issue, page 193). Efforts have been made to eliminate the discrimination against lawyer-veterans as to post-admission training (see our April, 1947, issue, page 338).

14. Active support has been given to the Advisory Committee's recommendations for the improvement of military justice (January issue, page 40), in respects as to which the War Department did not accept the proposals of its own Advisory Committee (see April issue, page 319, and September issue, page 898).

15. Plans for aid and encouragement to lawyers in devastated countries of Europe have been made (November issue, page 1116).

16. Basically and above all, our Association and the JOURNAL have worked unceasingly to support and maintain the American constitutional republic, the independence and competence of its Courts and the

profession of law, the inviolability of human rights vouchsafed by constitutional guarantees, the continual improvement of the administration of justice, the ending of arbitrariness and abuses by administrative agencies, the supremacy of law and fair play in our own country and in international affairs, in the many phases in which these objectives take form.

The foregoing is not complete, in its enumeration or detail, but will suffice to denote salient features of a notable year in our Association.

Major Edgar Bronson Tolman Dies at 88

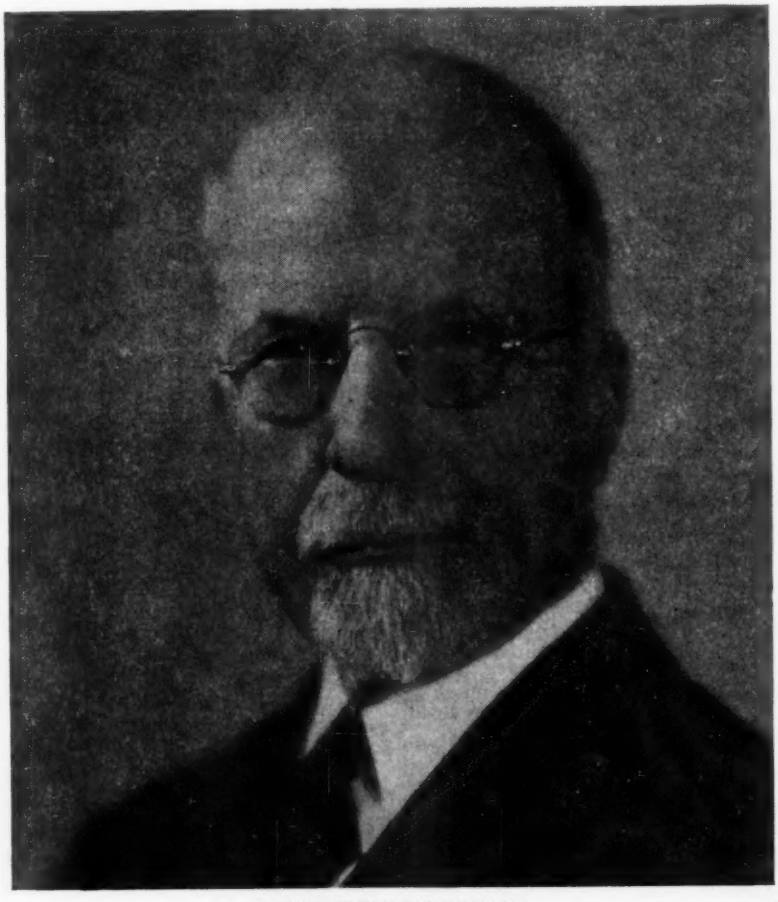
■ The Editor-in-Chief Emeritus of the JOURNAL, who served as its Editor-in-Chief from the end of 1921 until his retirement from that post in July of 1946 (32 A.B.A.J. 389; July, 1946), died at his home in Chicago on November 20, after a short illness. He had continued to practice his profession and to write and edit for us his "Review of Recent Supreme Court Decisions" practically to the day of his death.

Edgar Bronson Tolman's career had been of great usefulness and true distinction, in his profession and to the public. He was born in Nowgong, British India, on September 5, 1859, the son of a missionary clergyman. He was graduated from the University of Chicago in 1880 and from Union College in law in 1882. From that time he practiced law continually in Chicago, and his interests and point of view remained primarily those of a practicing lawyer. He appeared in important cases in civil litigation, and won a reputation for competent and effective work at the Bar. From 1903 to 1906 he was Corporation Counsel of the City of Chicago; from 1935 to 1938, a Special Assistant to the Attorney-General of the United States. As a major in the First Illinois Volunteer Infantry, he took part in the Santiago (Cuba) campaign in the Spanish-American war. In 1917-18 as a major of infantry in the U. S. Army, he was assigned to supervise the administration of the draft (selective service) in Illinois, was promoted to the rank of lieutenant-colonel, J.A.G.D., and was awarded the D.S.M. for his outstanding service.

In 1935 the Supreme Court of the United States named him as a member of its Advisory Committee to draft and report Rules of Civil Procedure for the federal Courts. He continued in that capacity and rendered invaluable service. A member of our Association since 1908, he received in 1939 its Gold Medal "for conspicuous services to jurisprudence".

He was long active in the work of the profession to which he belonged, and was President of the Law Club of Chicago in 1910-11, the Chicago Bar Association in 1911-12, and the Illinois State Bar Association in 1917-18. He was devoted to the work of the American Law Institute, and was a member of its Council since 1924.

In politics he was a life-long Democrat of progressive or "liberal" faith and in his earlier years was an influential adviser in the councils of his party in his city and State. He was a member of several patriotic organizations, and received a LL.D. degree from Northwestern University in 1927. He enjoyed the friendship and the confidence of judges and lawyers throughout the country, and was admired and loved by a host of friends. An editorial in this issue is tribute to his distinguished services and his career as an exemplar of our profession.



EDGAR BRONSON TOLMAN

Lawyers in War Devastated Countries:

Our Association's Practical Plan To Help Them

▪ What can be more important for the future of law and free government in the World than an independent and vigorous legal profession in the countries of Europe? What more effective thing can American lawyers do now for the future of our own institutions and profession, than to join in giving practical assistance to those lawyers and judges in war-damaged countries who have suffered severe privation and hardship, have lost the tools of professional work, and are having to re-build themselves and their Bar organizations under conditions of hunger and want? Aid by our Government will bring assistance to masses of people, but not to the lawyers as such. Should not we of the profession of law do what we can to look after our own—the lawyers and judges who are trying to "carry on" and keep faith amid most difficult and discouraging conditions?

Our Association has a practical plan for four-fold assistance. It has been developed by our Special Committee consisting of Former Presidents Jacob M. Lashly, Joseph W. Henderson, and Willis Smith. It is based on what Mr. Lashly saw and heard at first-hand in Europe. It was approved in general objectives by the House of Delegates on September 24 and was specifically authorized by the Board of Governors on November 8. The advice and suggestions of our members as to the over-all plan were asked for by President Gregory in our November issue (page 1116).

▪ Our Association's Special Committee on Aid to Lawyers in Devastated Countries takes this means of communicating to American lawyers, further details of its concrete plans for four-fold assistance to lawyers and judges who are in dire need of it:

1. *Typewriters for Law Offices:* Many lawyers, especially in France, lost their typewriters, through destruction, confiscation and removals, or wearing out during the Nazi occupation. There is no source at this time from which these machines could be replenished, even if the lawyers who lack them had the funds to purchase new ones. Our Committee will collect used typewriters, have them re-conditioned, have the type changed so as to ready them for foreign-language use, and make these machines available to deserving lawyers and judges, as an act of understanding and sympathetic interest on the part of our Association and the lawyers of America.

It is estimated that the average cost for re-conditioning and changing the type of American used typewriters will approximate the sum of $60, and many donors of machines will want to contribute or underwrite this expense along with their gifts. Those wishing to make cash contributions toward expenses such as boxing, crating, shipping, warehousing, and other overhead expenses of the project, whether donors of typewriters or not, should do so by check payable to the American Bar Association, remitted to the Headquarters Office, 1140 North Dearborn Street, Chicago 10, Illinois, specified for "Typewriter Fund".

2. *Law Libraries To Replace Those Destroyed or Removed:* There is no up-to-date or adequate library of American law books in Paris, Rome, and many other European cities, to which the members of the indigenous Bars may have access in order to fit themselves to adequately advise their clients about their rights under American law and usages. Many important problems are arising which involve such questions. Our Committee seeks to acquire modest, minimum-size American law libraries, suitably selected for ready access to the main subjects that most frequently arise and will give them to the Bars of selected centers for the free use of members of our profession. The investigations by the Committee have not come to a point where more definite plans can be announced as to this item of the program.

3. *International Cultural Exchange Program:* The Surplus Property Act of 1944, with the amendments of 1946, known as the Fulbright Act, is nearly ready to be implemented and put into operation

in some of the countries in which our Committee seeks to make a demonstration of American friendship and interest toward the members of the Bar. Our Committee proposes to identify itself with the functioning of the cultural interchange machinery, in so far as the program applies in the field of legal education, and to render such aid as may seem appropriate and practicable in the processes of selection and settling of teachers and students in foreign countries with which interchange arrangements shall be completed, and for securing scholarships in American institutions and maintenance for foreign students who wish to secure or complete their education in the United States. Definite plans for the participation of our Association in this program must await its further development. It is believed that it will be ready in Italy in a matter of weeks, and possibly in France in the course of a few months.

4. *Personal Aid to Judges and Lawyers:* Many members have inquired as to what is the most practical means of making gifts of food or wearing apparel to relatives, friends or other persons whom they wish to help in the devastated countries. Our Committee advises that packages of non-perishable food and clothing may now be mailed through the Post Office to most countries of Europe. In many of the countries, but not all, such packages are duty-free. Permissible weight and size vary according to the country to which the package is to be sent. Information, with circulars distributed by the Department of Commerce, may be secured from nearly all post offices, telegraph or express offices, or by writing to the Department of Commerce at Washington.

Our Committee believes, however, that the service furnished by the *Cooperative for American Remittances to Europe, Inc.*, offers the safest and most economical medium for dispatching packages of food or clothing to persons in foreign countries. The *CARE* packages are made up from supplies already in Europe and are delivered without charge, profit or customs duties. The literature in regard to *CARE* services is available in department stores and in many post offices, railroad stations and other public places. A package may be arranged for, without trouble or delay, by sending a check or money order for the sum of $10.00, addressed to *CARE, 50 Broad Street, New York 4, New York,* accompanied by a careful and legible statement of the name and present address of of the desired recipient.

The Committee expects that donors of gift packages will communicate directly with *CARE;* but as a service to those who wish to send a *CARE* gift package to some member of the Bar or judiciary abroad, the Committee is collecting from reliable Bar organization sources the names of lawyers and judges to whom such packages might properly be sent in various devastated countries, and will select a recipient and forward a package upon request. Checks for such gift packages should be drawn to the order of American Bar Association and sent to its office in Chicago, with the notation that it is for a "Gift Package".

Distressing Conditions Under Which Lawyers and Judges "Carry On"

Dire need for help is not limited to France, Italy, Britain, Belgium, Holland, Norway, etc. In Germany the struggle to restore impartial Courts of justice is face to face with repugnant philosophies. Judges and lawyers carry on their work under conditions of great hardship.

Our Committee quotes the following from a letter to its Chairman by Alvin J. Rockwell, Director of the Legal Division of OMGUS for Germany, which contains a graphic example:

> There is a final problem which was only briefly touched upon when you were here but which might be mentioned. The bench of Germany is suffering as much as the law school faculties. The judges are less than half the number that staffed the Courts before the war. A great many of these men are well advanced in years; all perform their duties under trying conditions—unheated court houses, inadequate food, lack of trained assistants, and shortage of supplies. In one court visited last winter not only was everyone bundled up in overcoat and muffler but the ink had frozen so the judge was unable to take notes. This judge, a man about 70, had to leave his home at seven and did not return until seven or eight at night. His lunch was a sandwich or two he brought with him. This is by no means exceptional and illustrates the problem. That the situation is serious is demonstrated by recent reports which indicate a loss of weight of upwards to twenty pounds by many judicial personnel.
>
> It is possible that the bench and Bar in America would be interested in hearing of this situation, and in gaining a greater understanding of the hardships suffered by people in one's own profession, in Germany and elsewhere. Individual *CARE* packages would be, of course, a Godsend to the German judges who might receive them.

There are many individual lawyers throughout France, Italy, England, and some other European countries, where the receipt of a gift package of food or clothing during the coming winter would amount to a never-to-be-forgotten event in their lives.

An Adventure in Good Will That May Have Great Consequences

There has never been a time within the whole history of the foreign relations of our country when the opportunity of individual lawyers and the organized legal groups in America to render a service, at the same time generous and patriotic, has been so clear. A closer fellowship and understanding between the members of our profession in an embattled country, and our own Bar, will be extremely helpful just now in the struggle between ruthlessness and justice which is going on.

The friendship and confidence inspired by so practical a move, though modest in proportion, may even prove to be the deciding factor in the settlement of the question of political dominance in which ultimately our own security and institutions are at stake. The importance of this adventure in goodwill fully warrants its adoption as a project by city, State and local Bar Associations throughout our country.

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Annual Survey of Law—II:

Further Analysis of Trends of Judicial Decisions

by **Roscoe Pound** • University Professor Emeritus of the Harvard Law School

■ Continuing our publication of Dean Pound's review and commentary on the *Annual Survey of American Law*, prepared under circumstances stated in our November issue (page 1093), the second installment deals still with decisions, legislation, and trends in the domain of public law. His discussion of the several chapters continues to give much food for thought. His comments on Dean Vanderbilt's monumental treatise on administrative law are especially recommended. In instances where he thinks that the writers of chapters were activated by a dubious philosophy of the law, Dean Pound does not hesitate to say so. "The enterprise of putting out such an *Annual Survey* is most useful," he lately wrote to your Editor-in-Chief. "I hope it will be kept up."

Our January installment should carry his forthright comments into the field of private law.

■ Under CIVIL RIGHTS the decisions of the Supreme Court as to confessions improperly obtained and perfunctory convictions of accused without counsel are well reviewed. But the case of most general interest is one in which an officer of a labor union, in response to a *subpoena duces tecum* to produce certain records of the union, claimed the privilege against self-incrimination on behalf of the union. The Supreme Court held the privilege was a purely personal one which could not be claimed by or on behalf of his unincorporated union.[17] For many purposes the unincorporated union is treated as a legal entity. It may make contracts and has many of the attributes of a corporation, but was said to lack the most essential attribute—a charter. This raises a question discussed by Professor E. H. Warren.[18] *Quaere*, whether too much weight may not be given to the word "corporation". What is a legal entity for many purposes is not necessarily cut off from other purposes because not in terms made a corporation. This is well discussed by Nékám.[19]

Cases and Trends as to Vital Freedoms

Cases on FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND FREEDOM OF RELIGION are well summarized and commented on as well as a noteworthy article by Raeburn Green.[20] Also there is a careful summary of the cases on discrimination against Negroes by party or State, interesting because the overruling of *Grovey* v. *Townsend*[21] in *Smith* v. *Allwright*[22] brought out the oft-quoted remark of Mr. Justice Roberts that the effect was to "bring adjudication of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." Under Involuntary Servitude, the Thirteenth Amendment, there is comment on *Pollock* v. *Williams*,[23] in which the Supreme Court went so far as to refuse to separate from substantive provisions of a State statute invalid provisions as to presumption. Professor Reppy says of this: "Technically there is much to be said for the view expressed in the dissent [Stone, C. J. and Reed, J.] but the realities of the case, together with the long defiant attitude in Florida, properly tipped the scales of justice in favor of the majority view." It looks like a situation of a hard case making bad law, especially where the result is to hold an act of a State legislature void. In connection with naturalization and revocation of naturalization, an opinion of Judge Hall, in the District Court in California,[24] is noted which analyzes and classifies the cases since 1906 and brings out the impossibility of recon-

17. *United States* v. *White*, 322 U. S. 694 (1944).
18. Corporate Advantages Without Incorporation, 522-523 (1929).
19. The Personality Conception of Legal Entity, 124 (1938).
20. Liberty Under the Fourteenth Amendment, 1943-1944, 43 *Michigan Law Rev.* 455 (1945).
21. 295 U. S. 45 (1935).
22. 321 U. S. 649 (1944).
23. 322 U. S. 4 (1944).
24. *United States* v. *Kusche*, 56 Fed. Supp. 201.

ciling the decisions of the lower federal Courts. The subject has been much discussed in recent books and articles which are referred to in the notes.

An Important Treatise on the Dangers Inherent in Administrative Absolutism

The chapter on ADMINISTRATIVE LAW, by Dean Vanderbilt, running to forty-five pages, and the closely related chapter on WAR POWERS AND THEIR ADMINISTRATION, also by Dean Vanderbilt, running to fifty-one pages with twenty-three more pages of appendices, are nothing less than a treatise on American administrative law as it stood before enactment of the Administrative Procedure Act of 1946; and, as a full, temperate, and fair exposition of the conditions which had developed, they give a basis for considering what that Act was intended to meet and what Courts and further legislation have before them in the task of making that Act effective for its purpose.

Rise and growth of the service-state, which seeks more than maintaining the general security and would actively promote the general welfare through doing things for us by a regimented cooperation instead of, so far as may be, leaving us to do things for ourselves, have given administration a leading place in the English-speaking world, in which that place had been shared by legislation and adjudication. Thus an administrative polity has been replacing our constitutional judicial polity, and we have been moving fast toward the polity of that part of the world whose institutional and legal ideas derive from Rome.

But in our Anglo-American legal-constitutional polity, what is done by those who exercise the powers and apply the force of politically organized society is expected to be done according to law. Hence, as a matter of course, as the phenomena of the service-state have begun to be noticed, there has been talk of administrative law. This leads us to ask, what is administrative law? To some it is the ordinary law of the land as applied to administrative agencies and officials. To others it is a separate and distinct system which, Continental and some recent English writers would have it, is superseding the law under which we had been living and is setting up a regime in which those agencies and officials are to be on a plane of their own, free from the checks and limitations characteristic of our legal polity and with ideals quite different from those which had dictated our constitutions.

What Is the Nature of "Administrative Law"?

What administrative law is depends on what is meant by law. Some of those who have been foremost in advocating unchecked power of administrative agencies to do what they like as they like, hold that law means simply whatever is done by officials. What such agencies do is or is to be law because they do it. Indeed, the more radical of these thinkers go further and deny that there is or ought to be any authoritative method in what is done by the agencies of politically organized society in adjusting relations, and assert that law is no more than a series of independent and more or less unconnected determinations and orders.

There are others, whose views are imported from Continental Europe, who hold that legislatures and the administrative hierarchy are or ought to be each final judges of their own powers, and that administrative agencies and officials are or ought to be final interpreters of the laws they are set up to administer. To others, administrative law seems to mean settled principles of procedure of administrative agencies in the exercise of their powers of investigation, guidance, and adjudication. But administrative law in that sense has as yet hardly developed as a system in America. It is, however, something which must be developed if our legal-constitutional polity is to endure. Lastly, administrative law might mean the body of legal precepts and technique of developing and applying them applicable in judicial scrutiny or judicial review of administrative determinations. Here, at any rate, is something with the characteristics which Anglo-American lawyers attribute to law.

Administrative law may be made to become law in the lawyer's sense. Principles of law, authoritative starting points for legal reasoning, may be worked out which are applicable to all administrative agencies and to all that each does. A technique and an *ethos* of administrative determinations may develop, as a technique and an *ethos* of judicial action have grown up. General categories with principles applicable to them may be found, and common features of the exercise of administrative powers may be discovered from which principles may be derived. To achieve this requires the technique of the common-law lawyer, developing experience by reason and testing reason by experience. It is in the spirit of a lawyer that Dean Vanderbilt approaches a survey of what has gone on in a crucial era of development of administrative law in this country. He takes the subject up under seven heads: (1) Separation of powers; (2) Delegation of powers; (3) Interpretation of statutes and regulations; (4) Procedure; (5) Execution of administrative orders; (6) Judicial review (federal cases), and (7) Judicial review (State cases).

Trends of Decision as to the Separation of Powers

As to the SEPARATION OF POWERS, a tendency in federal decisions to uphold wide powers of interference with liberty and property solely upon the authority of an executive order is noted, and a like tendency is found in State decisions. As to delegation of powers, Dean Vanderbilt points out that if *Schechter Corp.* v. *United States*[25] is not "dead, there can be little doubt that its force has been greatly weakened, at least for the time being." The cases turn chiefly on whether a standard has been established by legislation which is simply to be implemented and applied by the administrative agency. In two dissenting opinions Mr.

25. 295 U. S. 495 (1935).

Justice Roberts showed how illusory the so-called standards had become.[26] Referring to the proposition that the Emergency Price Control Act could be upheld under the war powers, he said it ought to be made clear whether such delegations without substantial limits could only be made in war time or would be upheld also in peace time administration; whether "the function of legislation may be surrendered to an autocrat whose judgment will be enforced by federal officers pursuant to civil judgments, and criminal prosecutions will be disposed of as matters of routine." Referring to the discretion of the President which in approving or prescribing codes, framed by delegated administrative officials with no tangible standards legislatively established, and thus "enacting laws for the government of trade and industry throughout the country, is virtually unfettered," he remarked that one need only read the decisions of the Emergency Court of Appeals to learn "how futile it is for the citizen to convict the administrator of an abuse of judgment in framing his orders, how illusory the purported judicial review is in fact." We should be vigilant that the exigencies of war have not fastened on us methods in peace which the war was waged to preclude. State Courts generally permitted large delegation of legislative power, though not to the same extent as the federal Courts, and they were often less frank than the federal Courts in justifying it.

Legislative Delegations of Power and Administrative Fixing of Standards

Legislative delegation of power in the United States rests upon a proposition laid down by Chief Justice Marshall that in case of a power of doubtful classification it is a legislative function to assign it to an appropriate department. Delegation of application of standards to administrative agencies is within this doctrine. The power of applying standards had been exercised by the Courts. But application of the standard of due care was left to juries, and application of the standard of conduct imposed on fiduciaries had been exercised by Courts of equity largely in an administrative fashion. Analytically the power might be held either judicial or administrative. Thus in turning it over to administrative agencies as to particular standards, the legislature is only assigning a power of doubtful classification to an appropriate department.

But how is it as to delegating to such agencies a power of fixing standards? Application of a standard to a particular case is a power of doubtful classification. Implementing by supplemental regulations a standard established or recognized by legislation may be so far a power of doubtful classification as to be assignable to administrative agencies as between the legislative and the executive departments. Where the line is doubtful it is for the legislature to draw it. A standard cannot be wholly objective. It has to be applied in view of times, places, and circumstances. Witness the standard of the reasonable prudent man in the law of torts, the standard of acts tending to corruption in the common law as to misdemeanors. The standard established by a statute needs to be more clearly defined than these, implemented by centuries of judicial decision, in order to admit of leaving implementation as well as application to an administrative agency.

An administrative regulation setting up a rule outside of the statute it is administering, and not in furtherance of a standard the statute furnishes, is inadmissible in our polity. The legislature must erect "guide posts" which will enable the administrative official or agency to make it effective in detailed application. But, as has been seen above, a persistent attempt has developed to evade the constitutional requirement by spurious interpretation of statutes.

Administrative Agencies as Final Judges of Their Own Powers

Some of the decisions in 1944 indicate a drift toward a doctrine of administrative agencies and so of the executive as final judge of their own powers, which strikes at the root of our constitutional system. This has been noticeable more with respect to interpretation of administrative regulations than in interpretation of statutes. But the regulations often involve determination of the powers of the administrative agency under the statute setting it up, and hence interpretation of a regulation may cover spurious interpretation of a statute. The Supreme Court has said, as a reason for adhering to an administrative interpretation, that the standards of public enforcement and those for determining private rights should "be at variance only where justified by very good reasons."[27]

Can there be good reason why an administrative agency can interpret a statute differently from the way it is interpreted for defining private rights in the Courts? In the same direction in passing on the interpretation of an administrative regulation, the Emergency Court of Appeals held that if the Price Administrator's definition of a word in one of his regulations did not conform to common usage or to the dictionaries, or to the understanding of the trade, his personal definition must be accepted as superseding generally accepted meanings. Dean Vanderbilt mildly characterizes this as questionable. The State Courts, on the whole, were more cautious in accepting administrative interpretations, especially when they sought to enlarge the legislative grant of power by means of a regulation.

Trends of Decision as to the Enforcement of Administrative Orders

As to execution of administrative orders, from time to time, since the beginnings of fusion of law and equity in procedure in New York in 1847, statutes providing for relief by injunction in particular types of cases have raised questions whether the general doctrines as to equitable relief applied in proceedings under

26. *Yakus* v. *United States*, 321 U. S. 414, 425, 460 (1944); *Bowles* v. *Willingham*, 321 U. S. 503, 534, 541 (1944).

27. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139.

such statutes, or the granting of an injunction, was a matter of course as a judgment at law would be if a case under the statute was shown. A generation ago, it was generally held and argued by the patent Bar that the maxims of equity did not apply where an injunction against infringement of a patent was sought—that the only questions open were (1) whether there was a valid patent, and (2) whether the defendant had infringed it. A like question arose under the Emergency Price Control Act. The statute provided that an injunction should be granted on application by the Price Administrator. It was argued, and a number of the lower federal Courts held, that an injunction at his suit was to be granted of course. Other Courts applied general equity doctrines and refused injunctions where no willful violation had taken place, where there was no prospect of future violations, and where an injunction would not achieve equitable results.

The matter was set at rest in *Hecht* v. *Bowles*[28] in an excellent opinion by Mr. Justice Douglas. He treated the question as one of interpretation of the statute, and held "in favor of that interpretation which affords a full opportunity for equity Courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices." It might be added that the canon of interpretation in accordance with the common law (meaning the common law as a system) confirms the result. The decision is an important one, beyond the field of administrative law.

Agency Efforts to Escape Judicial Scrutiny

Judicial review is now governed in large part by the Administrative Procedure Act of 1946. But it is worthy of notice to what extent legislation withdrew or sought to withdraw administrative determinations from judicial scrutiny and to what extent the Courts acquiesced. As Dean Vanderbilt says: "Instances of non-reviewable matters tend to increase in war-time." But the endeavors of administrative agencies to escape judicial scrutiny of their action are not confined to war-time. They are perennial and persistent and call for continual vigilance of the Bar to prevent the setting up of an administrative regime free of constitutional and statutory checks.

In this there is no denial of the need and place of administration in the service-state and no hostility to its development. It can do its legitimate work efficiently and well within the limits of the Constitution and of the statutes providing for it. The dissenting opinions of Mr. Justice Roberts and Mr. Justice Rutledge in *Yakus* v. *United States*,[29] quoted by Dean Vanderbilt, will deserve consideration when peace-time legislation of the sort comes before the Court. It should be observed also that the decision in the *Yakus* case was extended by the lower federal Courts.

State Courts allowed a much greater degree of judicial review than the federal Courts, partly because State legislatures have been less inclined to preclude it and partly because State Courts of last resort "have generally been zealous in exercising their duties as successors of the King's Bench in superintending the jurisdiction of inferior tribunals and statutory agencies, particularly where constitutional provisions are involved." Much of the difficulty in the State Courts, especially where procedure is governed by detailed, hard and fast statutory provisions, has been to find available remedies for obtaining effective judicial review. The inadequacy of common-law *certiorari* was brought out clearly. Pressure of war conditions has held back development of procedure at this point.

War-Time Agencies and Their Administration of Powers

In the chapter on WAR POWERS AND THEIR ADMINISTRATION, Dean Vanderbilt gives a full account of the growth and operation of war-time agencies during 1944, setting forth all the agencies then existing, the supervisory agencies and their administration, priorities and rationing, price control, labor and manpower, the corporations set up with respect to smaller interests, the legislative, executive, and administrative action as to matters directly involved in warfare, State legislation and administration, Congressional investigations, and tension within executive agencies. It proved impossible to be sure that every instrumentality was accounted for. One agency, which had issued checks amounting to three and one-half billion dollars was not listed in any number of the Government Manual. Aside from this "government nobody knows," the outstanding feature during the year was a determination by Congress to take a firmer hand in improving the war-time establishment and in defining its policies. The tendency toward the superseding of both the legislative and the judicial departments by the executive had sensibly abated.

Mr. Kaplan, in the chapter on CIVIL SERVICE, criticizes an Ohio Court for holding there is a tort liability of a public officer for acting outside of his jurisdiction and without authority of law and thus causing harm to an individual, and criticizes a California Court for holding a city manager and a city chief of police in tort for negligence in permitting police officers, to their knowledge repeatedly guilty of brutal conduct, to remain in their positions where there were ample powers of removal and the death of a prisoner from brutal and inhuman beatings resulted. He feels that as a result it may "prove hazardous and unprofitable to hold public office."

But the decisions in question go on a doctrine fundamental in Anglo-American law, that public officers are on the same plane as the rest of us and must answer for injuries to individuals due to their acting beyond their powers or to their negligence. The objection that this common-law liability will interfere with efficiency is the one raised also by proponents of administrative ab-

(Continued on page 1248)

28. 321 U. S. 321, 330 (1944).
29. 321 U. S. 414, 448, 458, 468 (1944).

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"Laughing With Congress": Senator Wiley Tells Many Humorous Incidents

by **Walter P. Armstrong** • of the Tennessee Bar (Memphis)

▪ "An anthology of American political laughs", to use Paul F. Douglass' apt phrase, has been assembled by Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary, member of our Association since 1923 and staunch co-worker for many of its objectives. "The grand art of laughing" is, of course, an important part of the process by which, under a free government, proposed legislation is tested by men's wits, pretense and impromptu ideas are deflated, and the crossroads scrutiny finally points the way to National policy. We doubt if "rubber-stamp" legislators under a dictatorship or a "planned economy" ever poke fun at each other and at other branches of government as do the members of both houses of the American Congress.

Senator Wiley has strung together an amusing batch of stories and anecdotes, and it may be that some of our readers in these tense days will relish "good, clean fun". But something more emerges—a philosophy of legislative government, a sanity of the lumbering democratic process, a realization that the over-all picture is on the good side.

▪ No doubt it was Senator Wiley's customary courtesy toward his fellow members that led him, in selecting a title for this little volume,[1] to emphasize the mirth-provoking sallies that originate on "the Hill" rather than the shafts of wit that are flung at the body of which this Wisconsin lawyer is a distinguished member. It was a permissible choice, for the brew is 'arf an' 'arf of the sayings of those who have laughed *with* and of those who have laughed *at* Congress.

Criticism of Congress is one of the few things in which the American people have shown a continuing consistency. Representative Everett Dirksen in 1942 compiled a long list of historic criticisms of Congress, the earliest of which dates back to the beginning of the Nineteenth Century; three[2] of the most popular of the current Broadway plays have scenes ridiculing members of the House or Senate. There are no *lacunae* in the years between.

The general idea seems to be that a Congressman will attain the proper humility only when, like Kipling's Tommy Atkins, he has "stood beside and watched himself be'avin' like a bloomin' fool." I have always thought that the thing was overdone, for Congress in the main is an intelligent, conscientious, hardworking body, fairly representative of the American people. It is because he shares this view that Senator Wiley good-naturedly quotes freely the most extreme jibes of the Congress-baiters. I may add that the Senator has no need to shrink from the "hair shirts" he exhibits, for he has no penance to do; he has always been a capable and energetic member whose work has reached its flower in his chairmanship of the Judiciary Committee of the Senate.

Members of the Congress Contribute Much Humor to Their Sessions

More entertaining than the invectives—nearly always exaggerated and frequently dull—that have been hurled at Congress is the humor for which the Representatives and Senators are themselves responsible. Of this there's an excellent cross-section. As the entire period of Congressional history is covered, necessarily some of the stories are not new. There's the one about those mortal enemies, John Randolph of Roanoke and Henry Clay, meeting face to face on a sidewalk too narrow for them to pass. Randolph: "I never turn out for scoundrels!" Clay (gingerly stepping out into the mud): "I always do." And the one concerning the colored barber and the new Senator. Barber: "By de way, Senator, you remind me of Dan'l Webster." Senator: "Is it my brow or my speeches?" Barber: "No, boss, it's your breath."

1. *Laughing With Congress*, by Alexander Wiley. Illustrations by Leo Manso. New York: Crown Publishers. September, 1947. $3.00. Pages ix, 228.

2. *Finian's Rainbow*, *Call Me Mister*, and *Command Decision*.

More in the modern manner: Member: "Have you heard my last speech?" Another Member: "I hope so!" Reprints from the *Congressional Record* "are printed without profit and read the same way." Congressman: "I don't pretend to have had the advantage of education; I am a self-made man, sir." Fellow Congressman: "I am glad to learn this; it certainly relieves the Lord of a great responsibility."

These retorts are perhaps not typical, for most Congressmen who essay humor are in their anecdotage and usually seek to make their point by a pertinent story. The anecdotes which are included are the most original and amusing I have come across in the last few months outside of Bennett Cerf's column[3] in the *Saturday Review of Literature.*

Oases Found in the Arid Wastes of Congressional Debates

It is not easy to transfer oral humor to the printed page—so much depends upon unexpectedness, appropriateness, facial expression, intonation. Senator Wiley has performed this difficult task well and has guided us to many oases in the arid waste of the *Congressional Record.*

Some of the humor is unconscious. Perhaps some day a Congressman who has involuntarily retired will tell us what he really thinks of those constituents who at times tried men's souls. Senator Wiley does give one or two instances where his colleagues' constituents have proved pestiferous, including the one who wrote for a copy of the Declaration of Independence "with all the recent changes"; but to the Wisconsin voters – half apologetically – he explains that "laugh-time" represents not "more than a tiny fraction of one per cent of Congress' proceedings", and that "on no occasion was any official business sacrificed in order to complete this volume."

Shrewd and Pithy Comments on the Work of the Congress

One of the excellencies of Senator Wiley's method is that he does not confine himself strictly to his subject. He includes Jerry Kluttz's[4] glossary of "bureaucratese, or the language of the red tapist", which is the wittiest and most penetrating challenge to bureaucracy that I have seen. From time to time Senator Wiley interjects shrewd and pithy comments on the work of Congress. Not even all the quotations from his colleagues are humorous. Senator Hill's defense of General George C. Marshall is an admirable example of modern Congressional eloquence:

> I recall what General Joffre said. Some one asked him, "Who won the battle of the Marne?" General Joffre replied, "I don't know who won the battle, but if it had been lost, it would have been Joffre who lost the battle." If we were to lose the war, if we were to have any unusual catastrophe, any terrible situation of any kind, I imagine that George C. Marshall, as Chief of Staff, would have to bear the prime responsibility.

ALEXANDER WILEY

We are being deluged with a spate of serious studies of Congress. Senator Wiley's book, dealing with the lighter human side, not only provides an excellent supplement to these, but it reveals the atmosphere and gives the flavor of Capitol Hill as no one of them does.

3. "Trade Winds." Senator Wiley's Congressional stories are racy of the soil, while Mr. Cerf's smack of the super-sophistication of the New York literary set.

4. Columnist of "The Federal Diary" in the Washington *Post.*

Conference of Section Chairmen Integrates Work for 1947-48

■ The annual Conference of Section Chairmen with Association officers and members of the Board of Governors was held at the Edgewater Beach Hotel in Chicago on November 9. President Tappan Gregory was in the chair at the two sessions.

Many matters as to the planning and better integration of the work of the Sections for the new Association year were taken up in candid discussion, including the preparation and filing of Section reports, the handling of Section finances, the scheduling of Section meetings, the ironing out of duplications or overlappings in work between Sections or between Sections and Association Committees, etc.

In view of the size of several of the present-day Sections and the manifest general interest in the programs of many of them, it was the consensus that the Assembly programs at Annual Meetings would be improved if selected Sections were assigned to present "open forums" or panel discussions. Plans for the more timely submission of Section recommendations for the consideration of the House of Delegates were also discussed. With the membership sessions of many of the Sections not convening until Tuesday of convention week, recommendations acted on by the Section members, as distinguished from the Section Council, cannot usually be placed before the House of Delegates in time for considered action at that Annual Meeting.

9

United States Courts:

Report of Director of the Administrative Office

■ According to the annual report of Director Henry P. Chandler, of the Administrative Office of the United States Courts, as submitted on September 25 to the Judicial Conference of Senior Circuit Judges convened in Washington, D. C. by the Chief Justice of the United States, the volume and nature of both civil and criminal cases in the federal Courts are resuming normal characteristics. The changes in the business of the Courts caused by the war are said to be disappearing. Peace-time issues are claiming the major attention. The most noticeable fact about the new cases is the increase of private litigation. Many significant facts pertaining to the practical workings of the United States Courts and their dispatch of the many types of litigation which come to their calendars are contained in the comprehensive Report of Director Chandler, who has been a member of our Association since 1921 and is ex officio a member of the House of Delegates. Our limited space enables us to publish only a part of the informative data given. With the Director's Report may well be read the address by Mr. Justice Harold H. Burton, of the Supreme Court of the United States, which was published in our November issue (page 1099).

■ The number of new civil cases filed during the fiscal year ended June 30, 1947,[1] went down from 67,835 in 1946 to 58,956 in 1947—a decrease of something over 13 per cent. This is accounted for mainly by the decrease in cases brought to enforce price and rationing regulations, which dropped from 31,252 in 1946 to 15,203 in 1947, or more than half. Private civil cases increased from 22,141 in 1946 to 29,122 in 1947—a rise of 32 per cent. Of these 2239 were suits against employers for compensation for time which employees asserted should have been included in the work week, as defined by the Supreme Court in the decision in *Anderson* v. *Mount Clemens Pottery Company*,[2] the so-called "portal-to-portal" cases. The filing of these cases took place almost entirely in the few months from December of 1946 to April of 1947, and virtually ceased with the enactment of the Portal-to-Portal Act of 1947, approved May 14, 1947.[3]

Six hundred and ninety-seven cases were brought against railroads under the Employers' Liability Act. Most of these, which, under the statute, can be brought in any district in which the railroad sued is doing business, were concentrated in a small number of districts, especially Eastern New York and Eastern Pennsylvania, each with 104, Northern Illinois with 85, Southern New York with 78, and Minnesota with 77. They added disproportionately to the load of the Courts in those districts. Suits by seamen against private defendants for damages under the Jones Act increased sharply from 451 in 1946 to 1607 in 1947. One thousand and ninety-six such actions were brought in the Southern District of New York and 292 in the Eastern District of Pennsylvania.

Increases in Admiralty Cases and in Cases Under Federal Tort Claims Act

Also in the Southern District of New York there was an increase in cases on the admiralty docket from 2224 in 1945 to 2718 in 1946 and 2800 in 1947. This amounted to over half of the total admiralty business of the federal Courts. While the government admiralty cases brought in this district went down from 2276 in 1946 to 2151 in 1947, the private cases of this nature increased from 444 in 1946 to 655 in 1947.

Tort actions submitted to the federal Courts under the jurisdiction based on diversity of citizenship, increased from 3433 to 4965, and over 40 per cent of these concerned personal injuries from automobiles. There were 675 cases filed under the Federal Tort Claims Act,[4] which entitles persons injured by torts of the federal government or its agencies, to recover their damage as a matter of right rather than of

1. Years designated in the report by numbers are fiscal years unless otherwise expressly indicated.
2. 328 U. S. 680 (1946).
3. Public Law 49 of the 80th Congress.
4. Title IV of the Legislative Reorganization Act of 1946, 28 U.S.C.A., Secs. 921-946.

HENRY P. CHANDLER

grace of the Congress through private claims acts as formerly, and gives them a remedy through suits in the District Courts.

A contrast with pre-war conditions may be had by eliminating from consideration cases brought by the Office of Price Administration and comparing other civil cases filed in 1947 with the civil cases filed in 1941. These cases begun in that year totalled 38,477. The comparable figure in 1947, without cases of the Office of Price Administration, was 43,753. The number of United States civil cases declined from 16,546 in 1941 to 14,631 (exclusive of price control cases) in 1947, but private cases increased in the same time from 21,931 to 29,122. Of the increase of something over 7000 in private cases, 1665 were in the District of Columbia, 241 in the territories and insular possessions, and 5285 in the other 84 districts, where the increase was divided between 3765 cases concerning federal questions, including "portal-to-portal" suits, 1406 cases under the diversity jurisdiction of the Courts, and 114 private admiralty cases.

Cases Under Fair Labor Standards Act Have Doubled in Number

Since the war there has been a steady increase in patent and copyright suits, but both these categories are still much below pre-war levels. Cases under the Employers' Liability Act continue to increase steadily, and, even if "portal-to-portal" actions are excluded, cases brought under the provisions of the Fair Labor Standards Act have doubled since 1945. Jones Act cases involving injuries to seamen are now considerably in excess of pre-war numbers. Private cases in reference to price regulations were more numerous than in any previous year since the Price Control Act was adopted, but there was some falling off in the second half year of 1947 compared with the first.

The Current Trends in New Criminal Litigation

The number of criminal cases commenced in 1947 was slightly larger than in 1946, 33,637 as compared with 33,203. Cases terminated were 900 more than the number filed, leaving a pending load of 8149 as compared with 9005 at the end of 1946. Of those cases, 2219 could not be tried because they involved fugitives or defendants serving in the Armed Forces. Criminal cases are normally disposed of promptly in the District Courts, as is shown by the fact that at the end of the fiscal year there were less than 6000 cases pending in which defendants were available, and this amounted to less than one-fifth of a normal year's business.

The trends in new criminal litigation were in the main what would be expected. War offenses decreased and there was an increase in such types of cases as automobile theft, larceny, and theft generally, and violations of the narcotic laws. A small decrease occurred in the number of violations of the Internal Revenue laws relating to liquor and there was a large increase in immigration cases. Almost 1000 defendants took advantage of Rule 20 of the Federal Rules of Criminal Procedure, and had their cases transferred from the district in which they were originally charged to the district of arrest, for plea and sentence.

The downward movement in new bankruptcy cases which had been uninterrupted for five years since 1941, ceased, and the number of such cases rose from 10,196 in 1946 to 13,170 in 1947, an increase of more than 29 per cent. Furthermore, the number of such cases tended generally to accelerate from quarter to quarter throughout the year, so that a higher number is probable in 1948. This corresponds with observations reported by Referees in different parts of the country.

The Disposition of Cases and Condition of the Dockets

Director Chandler reports that it still is true, as he noted last year, that generally the dockets of the federal Courts are in a current condition. The increase in the number of private civil cases has, however, considerably increased the work load of most of the District Courts. The number of districts in which there is congestion is tending to increase, and the congestion in districts in which it has been commented on before, particularly the Southern District of New York, is becoming more aggravated.

The sharp increase in the civil business of the district courts in recent years, has not been reflected in the Circuit Courts of Appeals. While the number of civil cases filed in the District Courts rose from 38,499 in 1944 to 67,835 in 1946, the number of appeals filed in the Circuit Courts of Appeals dropped from 3072 in 1944 to 2627 in 1946 and 2615 in 1947. For five years, beginning in 1943, the number of cases in those Courts declined somewhat each year. The number of cases disposed of in 1947, 2654, exceeded the number filed, 2615, so that the number of cases pending declined from 1531 to 1492 during the year. (See Figure 1.)

The Second Circuit continued to dispose of the largest number of cases, as it has for a number of years, both in total cases terminated and in the number of cases disposed of after hearing or submission, with the Fifth Circuit second in order and the Seventh Circuit third. Cases term-

Cases filed in the Circuit Court of Appeals[5]

FISCAL YEARS	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947
Total Cases	3281	3318	3505	3213	3228	3093	3072	2730	2627	2615
Appeals from Courts	2633	2587	2561	2404	2369	2226	2298	2168	2188	2195
Administrative Appeals	540	649	800	803	835	826	717	511	418	400
Appeals from Federal Trade Commission	45	31	23	23	47	26	51	26	4	8
Appeals from National Labor Relations Board	85	196	306	248	248	275	183	108	107	124
Appeals from The Tax Court of the U. S.	338	356	414	462	479	469	447	331	267	216
Other Administrative Appeals	72	66	57	70	61	56	36	46	40	52

FIGURE NO. 1

inated and disposed of by circuits were as follows:

	Docketed	Terminated
Court of Appeals, District of Columbia	264	284
First Circuit	98	98
Second Circuit	378	386
Third Circuit	266	216
Fourth Circuit	128	113
Fifth Circuit	324	335
Sixth Circuit	210	254
Seventh Circuit	282	292
Eighth Circuit	194	233
Ninth Circuit	312	270
Tenth Circuit	159	173
Total	2615	2654

Petitions to the Supreme Court for review on certiorari to the Circuit Courts were slightly less in volume than last year, but the proportion of petitions granted to the number filed remained about one-fifth, varying from 11 per cent in private civil cases to 35 per cent in administrative appeals.

Number of Civil Cases in District Courts Decrease

The number of civil cases commenced in the District Courts of the eighty-four districts in the Continental United States having purely federal jurisdiction decreased decidedly in the fiscal year 1947 as compared with 1946.[6] In the later year, 48,809 civil cases were filed compared with 57,512 in the previous year. The number of civil cases terminated was less by 4179 than the number commenced. Cases in which the United States was a party that were terminated exceeded cases of that class filed, but the reverse was true as to private cases, 19,650 of which were filed and 13,811 of which were closed. This left a total of 19,593 private cases pending June 30, 1947, compared with 13,754 a year earlier, an increase of almost 6000. Even when "portal-to-portal" cases are subtracted from the totals for private litigation, the 1947 figures were almost one-fourth larger than the pre-war average; and in every quarter since the first three months of the fiscal year 1946, during which the war ended, there has been a continuing increase in the number of private cases filed.

Many other phases of the work of Courts and that of the Administrative Office, as well as the various bills in which the Judicial Conference has interested itself for the improvement of the administration of justice are discussed in the Director's report. The proceedings of the recent Judicial Conference of Senior Circuit Judges, when made available through the report of the Chief Justice, will be summarized in the JOURNAL.

5. Some miscellaneous original proceedings not coming under either appeals from Courts or administrative appeals are not included, so that the sum of the two categories does not equal total cases.

6. These figures are for the eighty-four districts located in the States of the United States and having only federal jurisdiction. They do not include the District of Columbia and the eight District Courts in the territories and insular possessions, which generally have local jurisdiction in addition to the federal.

Third Conference for Traffic Court Judges and Prosecutors February 9-13, University of California

■ Following the completion of a successful five-day Traffic Court Judges and Prosecutors Conference held at the School of Law, Northwestern University, Chicago, on October 13-17, the American Bar Association and the Traffic Institute of Northwestern University announce that a similar conference, the third in a series, will be held at the School of Jurisprudence of the University of California, at Berkeley, on February 9-13, 1948.

10

"Books for Lawyers"

PORTRAIT FOR POSTERITY. *By Benjamin P. Thomas.*[1] *New Brunswick, New Jersey: Rutgers University Press. 1947. $3.00. Pages xviii, 329.*

Beside this corpse, that bears for winding-sheet
The Stars and Stripes he liv'd to rear anew,
Between the mourners at his head and feet,
Say, scurrile jester, is there room for *you?*

Yes: he had liv'd to shame me from my sneer,
To lame my pencil and confute my pen;
To make me own this hind of princes peer,
This rail-splitter a true-born king of men.

Shocked by the assassination, Tom Taylor in *Punch* (May 6, 1865) thus confessed his contrition for the scathing ridicule which for years he had heaped upon Lincoln:

. . . . with mocking pencil wont to trace,
Broad for the self-complaisant British sneer,
His length of shambling limb, his furrow'd face,

His gaunt, gnarl'd hands, his unkempt, bristling hair,
His garb uncouth, his bearing ill at ease,
His lack of all we prize as debonair,
Of power or will to shine, of art to please;

Taylor's verses well expressed what was in the mind of many another—some in Britain, more in the United States. At least for a while after canonization even the voice of the *advocatus diaboli* is stilled. When Booth's bullet ended Lincoln's life, it not only stopped temporarily the scandalous stories that had been circulated about him but initiated the Lincoln legend. The chief sufferers were the biographers; not only were their viewpoints obscured, but even when they continued to seek the truth it was increasingly elusive, and when they captured it, the difficulty in having it recognized was frequently insurmountable.[2]

Mr. Thomas set for himself the task of telling the story of these biographers and he has performed it admirably. For a number of reasons it is a story well worth telling. In itself it is of fascinating interest. The sudden apotheosis of Lincoln was a major challenge to every truth-seeking biographer; there was some evidence at least supporting diametrically opposite conclusions; moreover, the testimony covering "the prairie years" was found partly in tradition and largely in the fallible memories of old frontiersmen. There were obstacles in addition to those with which every biographer is faced: evidence must be weighed; a proper sense of proportion must be maintained; constantly the decision must be made as to how far the feelings of the living should be spared, if not at the expense of truth at least with the penalty of reticence. Finally, neither biographers nor readers could free themselves from the sequelae of the bloodiest and most divisive civil conflict that had been waged in modern times. If the theme was ideal for the eulogist it was only a little less so for the debunker; only to the true historian did it seem hopelessly baffling. Each tried his hand and Mr. Thomas tells us how and why each succeeded or failed.

Not only has the Lincoln theme tempted all kinds of biographers, but during the last millenium it has attracted more than has any other subject—Napoleon included. The result is that if one learns—as from this volume one can—how the various biographers of Lincoln treated their subject, one has learned a lesson in the art of biography from practical examples, not from theoretical abstractions.

If this book is an aid to students of biography it is a boon to those who, without being Lincoln scholars, have read widely and discursively in the field and have been sorely puzzled by the varying accounts of some of the phases of Lincoln's early life. Indeed, for such readers this is one of three indispensable handbooks, the other two being Paul M. Angle's *Shelf of Lincoln Books*[3] and the *Lincoln Reader*.[4] As Mr. Thomas has described the biographers and their methods, so Dr. Angle has evaluated the biographies and in his *Lincoln Reader* has told the story of Lincoln's life by collating excerpts from them.

Mr. Thomas begins with the pietist Josiah G. Holland, and ends with the impressionist Carl Sandburg. In each instance there is a sketch of the biographer; all of these sketches are candid and some are severe—particularly the one of Henry C. Whitney, author of *Life on the Circuit With Lincoln*. Equally outspoken

1. By arrangement with the publisher a special edition of this book was distributed to the members of the Abraham Lincoln Association. For four years Mr. Thomas was executive secretary of the Association.

2. "Half the writers of the time produced a sonnet or an ode to Lincoln, a biography or an essay about him, a tribute in prose, Lowell, Stoddard, the young poets Stedman and Richard Watson Gilder, Bret Harte in California, Josiah Gilbert Holland. He appeared as a character in the Western novels of Edward Eggleston and Joseph Kirkland." *The Times of Melville and Whitman*, by Van Wyck Brooks (Dutton: New York) October 31, 1947.

3. New Brunswick: Rutgers University Press, in association with The Abraham Lincoln Association of Springfield, Illinois.

4. New Brunswick: Rutgers University Press. Reviewed in 33 A.B.A.J. 346; April 1947. Dr. Angle was the first secretary of The Abraham Lincoln Association and served for seven years.

but entirely sympathetic is the story of William Herndon, Lincoln's last law partner. Herndon's faults, in Mr. Thomas' view, were the result of his antipathy to Mrs. Lincoln, of his tendency to psychoanalysis, and of his belief that the more sordid Lincoln's early surroundings the more illustrious his later life. Although Herndon sometimes accepted unreliable testimony he did not consciously trifle with the truth; when he spoke as of knowledge he spoke with accuracy.

This was also the opinion of Herndon held by Albert J. Beveridge, who was one of the most capable, unbiased and painstaking of the Lincoln biographers. Herndon in fact has suffered because of others. He sold his Lincolniana to Ward Lamon, whose biography was ghost-written by Chauncey F. Black, the son of Buchanan's able Attorney General, Jeremiah S. Black, of Pennsylvania. Chauncey Black was far from impartial, especially in recounting the events of the Buchanan Administration. Herndon was outraged by this, and was equally outraged by the tone of sustained eulogy in Nicolay and Hay's *Life*. The result was Herndon's *Lincoln*, for which Herndon (who had only delivered a copy of his material to Lamon while retaining the original) furnished the facts while Jesse W. Weik did the writing.

Nicolay and Hay are not spared; they were given access to the Lincoln papers, including those released last July, on condition that everything they wrote should, before publication, be approved by Robert T. Lincoln—a right of editorship that Robert Lincoln freely exercised, as is demonstrated by the specimen pages Mr. Thomas reproduces. Such is the fate of "authorized" biographers; one of them who had suffered at the whim of his subject's relict once remarked that "suttee should be made compulsory on the widows of celebrities."

Robert Lincoln was not content with blue-pencilling and sometimes partly rewriting Nicolay and Hay's manuscript; he lost no opportunity of suppressing anything that placed his father in an unfavorable light. His attitude and conduct as described by Mr. Thomas lend color to Arthur Krock's story[5] that the Lincoln papers were placed in the Library of Congress so as to be safe from the eyes of Beveridge. Moreover, it is unlikely that a thorough examination of these papers will reveal anything that can be made the basis of criticism of Lincoln, for Robert Lincoln did not knowingly leave any such documents accessible.

Mr. Thomas maintains interest by refraining from attempting a learned critique of the biographies, by consistently adhering to the concrete, and by frequently lapsing into the anecdotal. Especially effective is the description of the country-wide searches for Lincolniana, which were conducted over a period of years by Ida Tarbell and William E. Barton. Of unique appeal to many lawyer-readers will be the delightful chapter devoted to their well-remembered friend, Logan Hay, of Springfield, and to his work as president of The Abraham Lincoln Association.[6]

This is not the kind of book that tempts a reviewer to quarrel with the author's conclusions; Mr. Thomas is much too tolerant and far too sparing in his own opinions for that. Even though one might have chosen Beveridge[7] or J. G. Randall as the most critically impartial and, therefore, the best of the Lincoln biographers, it is easy to understand why Mr. Thomas believes that "those biographers like Tarbell, Charnwood and Sandburg, who combine realism with a touch of imagination, have come closest to success."

WALTER P. ARMSTRONG
Memphis, Tennessee

5. "In the Nation. A Glimpse at Contents of the Lincoln Papers"; The New York *Times*, April 8, 1947.

6. The leadership of Logan Hay is largely responsible for the scholarly activities of The Abraham Lincoln Association. The Association is presently engaged upon its most ambitious undertaking—the publication of the complete writings of Lincoln.

7. "My excursions into the past are interrupted occasionally by my neighbor ex-Senator Bevericge with some chapter of a life of Lincoln that he is writing. If he has patience to finish it, I think it will be the Life." Letter of Justice Oliver Wendell Holmes to Dr. Wu, dated September 6, 1925. *Justice Holmes to Dr. Wu: An Intimate Correspondence, 1921-1932*, (New York: Central Book Company, Inc. 1947).

CASES AND MATERIALS ON ADMINISTRATIVE LAW. *By Milton Katz. St. Paul, Minnesota: West Publishing Company. 1947. $8.00. Pages xiii, 1108.*

The rapid pace at which administrative law has been developing in this country is reflected by the high degree of obsolescence in casebooks on the subject. Teaching materials assembled a few years ago are not only outmoded by more recent decisions; they also are rendered inappropriate by a shifting emphasis in the matters to be covered in the typical course. Not too long ago, the law school course in Administrative Law was conceived to be primarily an adjunct of the course in Constitutional Law in which special attention was given to leading decisions on the doctrines of separation of powers and delegation of powers and to a few much-mulled-over cases on the scope of judicial review of orders by the Interstate Commerce Commission. Today, with the underlying doctrines entrenched and with the position of the administrative tribunal firmly established, the dynamic subject-matter for teaching is not the constitutional basis for the existence of the government bureau but the functioning of the bureau itself.

One of the better outlines of this new approach is that disclosed in the recently published casebook by Professor Katz of Harvard. The author, having had much to do with the development of procedure before several federal agencies, has been able to draw upon his own practical experience, albeit that experience has been largely on the side of the government. Thus, while his book continues to carry some of the older cases, the emphasis is clearly upon the grist that must be known and appraised by any lawyer who engages in more than casual practice before administrative bodies. Such data as the reports of Congressional committees, the annual reports of particular agencies, and specimen orders, rules and regulations, give to this volume a realistic tinge which

was lacking in many of the earlier collections of cases. There have been so many important cases recently decided by the Supreme Court on the scope of the respective powers of the new federal agencies, it probably was not feasible to include in a single volume not only those indispensable Court decisions, but also a good cross-section of opinions by the administrative bodies themselves.

Yet it is the commission's opinion rather than the ultimate Court decision which must be taken by the lawyer as the first and most important guide to his practice before the agency in question. Attorneys engaged in anything like continuous practice before a federal body know that much water passes over the dam before the Supreme Court ultimately decides any issue, and his job most often is to navigate in the turbulent interim streams of administrative action. This is one phase of administrative law that needs more attention in law school curricula.

Limitations on space may also have compelled Professor Katz to restrict his book almost entirely to administrative law as developed in terms of federal agencies. He has included no State statute and only one opinion by a State Supreme Court —that one, appropriately enough for a book by a Harvard professor, is by the Supreme Judicial Court of Massachusetts. As exciting and dramatic as the law and literature on the development of federal agencies during the past fifteen years may be, the fact remains that most lawyers have still to deal with administrative law in terms of State and municipal commissions. This phase of the "new" law has been neglected too long in most law schools. Practice and procedure before a local zoning board of appeals, or a State Workmen's Compensation Commission, or even a State Public Utilities Commission cannot be satisfactorily taught in terms of questions arising before the exalted tribunals of Washington. Indeed, in many cases, the trends noted with respect to federal agencies actually may be misleading as applied to State and local tribunals. Professor Katz has marshalled in splendid fashion the sensational developments of federal bureaucracy since the early thirties. Is it too much to have expected that he, an exponent of those centralized controls, should have given some recognition to that wide field of local action in which most American lawyers still have their practice?

It is interesting to note that, despite the emphasis upon recent developments, the opinions, sixteen in number, of Mr. Justice Brandeis appear most frequently in the book. Chief Justice Hughes is a close second with fifteen opinions represented. Of the present members of the Supreme Court, Professor Katz, with a discreet showing of impartiality, publishes thirteen opinions for the majority by Mr. Justice Douglas, a former teacher of law at Yale, as against eleven of such opinions by Mr. Justice Frankfurter, the author's distinguished master and predecessor at Harvard. However, a slight deference is paid to the past seminars in Administrative Law at Cambridge by including also two concurring opinions and one dissenting opinion by Mr. Justice Frankfurter. Rather less recognition is given to the former Deans of Law Schools, with eight majority opinions, one concurring opinion and one dissent by Chief Justice Stone, four majority opinions by Mr. Justice Rutledge and one by the former Dean of the Yale Law School, Judge Charles E. Clark, of the United States Circuit Court of Appeals, being included in the main body of the book.

RICHARD JOYCE SMITH
Southport, Connecticut

SPEAKING FRANKLY. *By James F. Byrnes. New York: Harper and Brothers. October, 1947. $3.50. Pages xii, 324.*

In his Foreword, Mr. Byrnes admits that writing is not his profession and that he has made no attempt "to acquire a literary style." Fortunately, he was not deterred from telling his story. The facts are eloquent enough. Relying for documentation on his own shorthand notes, on contemporary memoranda, and on the official records, Mr. Byrnes describes his "search for peace" at the Big Three Meetings at Yalta, (1945) and Potsdam (1945), the Foreign Ministers' Council (London, 1945; Moscow, 1945; Paris, 1946), the United Nations General Assembly and Security Council, and the Twenty-one Nation Paris Peace Conference (1946).

As history alone the volume has great value. The wealth of unreported incidents and unpublished conversations here appearing for the first time are worthy of study and reflection. But Mr. Byrnes has done more than tell a story. He has accepted the responsibilities of his unique experience to suggest a course of action for the days ahead. That his experience in negotiating with the Russians was disillusioning, he frankly admits. Serving in Congress over a long period with 2000 Congressmen, in the Senate with nearly 200 Senators, adjusting differences within each branch, devising compromises between the two branches, coordinating economic stabilization and war mobilization—all this experience in dealing with men had failed to prepare him for Mr. Molotov. He observes grimly: "I've tried everything I ever learned in the House and Senate. But there I worked with a majority rule. This is more like a jury. If you have one stubborn juror, all you can expect is a mistrial."

"What are the Russians after?" asks Mr. Byrnes. In Germany, Mr. Molotov told him, the Soviets want $10,000,000,000 of reparations and participation with the United States, the United Kingdom and France in a four-power control of Ruhr industry—that is, a veto on the coal, iron, and industrial production of an area which may be viewed either as "the arsenal of Europe" or as the vital nerve of an economically healthy Europe. "Wisdom and justice," observes Mr. Byrnes, "will prevent the United States from ever acceding to the Soviet demands either on the Ruhr or on reparations."

The next meeting of the Council of Foreign Ministers is scheduled for November, 1947. The creation of this Council was the idea of Mr. Byrnes, and it was based upon an assumption that all States were "animated by a common purpose, the early restoration of peace." How true was the assumption? Let Mr. Molotov answer in his own words, his significant statement to the Council of Foreign Ministers at Paris, July 10, 1946:

> Before talking about a peace treaty with Germany it is necessary to solve the question of setting up an all-German government. . . . But even when a German government has been set up *it will take a number of years* to check up on what this new German Government *represents* and whether it is trustworthy. . . . A future German Government must be such a *democratic* government as will be able to extirpate the remnants of Fascism in Germany and which will at the same time be able to fulfill Germany's obligations toward the Allies. Amongst other things and *above all* it will be bound to carry out reparation deliveries to the Allies. Only when we become satisfied that the new German Government is able to cope with these tasks and is really honestly fulfilling them in practice will it be possible to speak seriously of concluding a peace treaty with Germany. (Italics supplied.)

Small wonder that Mr. Byrnes has reached the conclusion that the Council of Foreign Ministers can no longer serve the purpose for which it was created—the early conclusion of a peace settlement. Other means must be found. He therefore suggests that the United States should take the initiative in calling a peace conference early in 1948. All the states at war with the Axis should be invited. The peace terms should be adopted by a two-thirds vote of all those present and voting, provided that they are also approved by two-thirds of the states that made military contributions to the victory. If Soviet Russia and her satellites refuse to participate, we should go ahead anyway. The treaty should provide that a state refusing to sign receives no benefits, and further reparations from the western zones of Germany should cease.

Suppose Soviet Russia should refuse to participate, to ratify the treaty, or to withdraw from eastern Germany? He does not think the Soviets will "force us to take measures of last resort"; but, if they do, he concludes that "only the power of the United Nations" can restrain the Russians.

The deep and abiding faith in the United Nations which is evinced by Mr. Byrnes throughout his book may occasion surprise to the skeptics. The key to his faith lies in his conception of the United Nations as a coalition of power potentially capable of the paradox of collective security—the enforcement of peace and security, by war if necessary. That this conception varies somewhat from the San Francisco conception which provided five States with a veto so that they need not fight one another may be admitted. Nevertheless, as Mr. Byrnes points out, a veto by one Member does not relieve the other Members of the United Nations of their obligations under the Charter; and that instrument permits in certain circumstances (e.g., Article 51) the maintenance of international peace and security by as many Members as can be enlisted to act in the name of the Organization to achieve its purposes. This, of course, raises questions as to whether the Continent of Europe could not be swiftly overrun by Soviet forces before the United Nations could act. These questions are not discussed by Mr. Byrnes. His optimistic conclusion is that a policy of firmness and patience by the United States will win a just peace.

HERBERT W. BRIGGS
Ithaca, New York.

VOTING PROCEDURES IN INTERNATIONAL POLITICAL ORGANIZATIONS. *By Wellington Koo, Jr. 1947. New York: Columbia University Press. $4.00. Pages vii, 349.*

In these days of stress, the fate of the world depends more than in any time in the past, on a proper solution of the problems of the governance of world affairs. The possession of adequate knowledge of the internal workings of the international machinery established for dealing with the political problems of the day has become, therefore, of importance not only to the limited group of "experts" on international affairs, but also to all public-minded citizens. It is not enough any more to know only the rudiments of world organization and to rely on snatches of information acquired from the newspapers or the radio. Frequently, no satisfaction of the thirst for knowledge can be found in any popular books on the United Nations, as they do not give enough facts on which a judgment could be formed. The time has clearly arrived for monographic, well-rounded studies of the more difficult aspects of the general problem.

The book under review, written by the young but able son of the Chinese ambassador in Washington, presents an important contribution to this method of approach. The author had the advantage of having participated in the most secret meetings of the San Francisco Conference; later he became a member of the legal staff of the United Nations. The book includes excerpts from his private records of the otherwise inaccessible discussions in the so-called "Committee of Five", in which the differences between the Big Five were ironed out during the San Francisco Conference. Some of his revelations confirm the reports then current about the divergences of views among the Big Five; others show how a common front has been built by them through mutual concessions and compromises.

The chapter on the struggle over the voting procedure in the Security Council forms the core of the book. Other chapters deal with the Concert of Europe, the League of Nations, and the General Assembly of the United Nations. Regardless of the title of the book, a large chapter is devoted to nonpolitical organizations such as the Food and Agriculture Organization.

In general, the author shows an eagerness to prove the validity of the

assumptions on which the Yalta formula on voting in the Security Council is based. He seems to approve the premise that "those with requisite force shall rule the world through the lawful application of that force, *as they jointly see fit*" (page 225). He believes that governments of powerful states cannot agree in advance to be bound by decisions which might run counter to their vital interests; only in powerless organizations can they agree to a majority rule. In consequence, when the Security Council of the United Nations was given far-reaching powers to maintain or restore international peace, the principal powers had to reserve the right to veto a decision based on a policy hostile to it or to its friends or satellites. Though he exalts the importance of the principle of unanimity of the permanent members of the Security Council, he is forced to admit that the Yalta formula "is not a device to secure agreement among the permanent members, but a method of ensuring against the results of disagreement" and gives to each such member a "legal basis" for preventing action by the Security Council (page 289).

Mr. Koo seems reluctant to express his views on the possibility or desirability of amending the Yalta formula. His main advice is that the Security Council should put an emphasis on its function to conciliate disputes by facilitating an agreement of the parties to a dispute. He disapproves of attempts to consider the Security Council as an impartial world forum or as a body which by a majority vote should convict an offender and brand him as such before the bar of the public opinion of the world. He contends that the Security Council should refrain from trying to solve issues or impose solutions by votes. Instead, the proceedings of the Council "should partake of the nature of a continuing process of accommodation" (page 291).

While many might disagree with these conclusions, and some might think the author's phraseology rather difficult, the book contains such a wealth of information that it ought to become a standard work on the subject. As its historical part does not go far beyond the San Francisco Conference, it will need to be supplemented some day with a treatise on the actual practice of the Security Council and of other organs of the United Nations. Already some of the ideas developed in San Francisco—for instance, that an abstention of a permanent member from voting shall be considered as a negative vote—have been changed by different devices. But the book under review should continue to be indispensable for all those who wish to trace the history of the Charter provisions on the subject.

LOUIS B. SOHN
Cambridge, Massachusetts

LATE CITY EDITION. *By Joseph G. Herzberg and Members of the New York Herald Tribune Staff. New York: Henry Holt and Company. September, 1947. $3.50. Pages ix, 282.*

Perhaps implicit in the absence of a chapter in this book dealing with the reporting and presentation of legal and Court news is the reason that newspapers too often give unsatifactory service in their portrayal of what the law is doing, what Courts are deciding, and how these trends affect the lives of everyone. This volume is a collection of twenty-nine pieces written by Mr. Herzberg and selected fellow-members of the staff of the New York *Herald Tribune*, and its purpose is to show the behind-the-page workings of a city newspaper and the almost-myriad activities involved in its preparation and production. If the affluent *Herald Tribune* has no one who is specially equipped to report law in action, what about the Nation's other papers?

In this book the gamut is run from the city room to the foreign correspondent, the copy desk to the "morgue", the city hall reporter to the suburban correspondent, the cub reporter to the sports writer. E. Douglas Hamilton, to whom the *Herald Tribune's* copy, open to such a question, is submitted, contributes a concise chapter on libel. Thus is given a composite distillation of the persons and operations that produce a big city daily. Each writer tells proudly of his particular job. And Mr. Herzberg and associates succeed in wrapping up and delivering a great deal of that fascination to the reader.

But where is the "law reporter"? Where is that staff man who, like the science reporter, has familiarized himself with a complex and sometimes baffling subject so that he may coherently report it to an increasingly discriminating audience? The truth of the matter is that he doesn't exist. The indictment is that American popular journalism has not taken steps to produce him. The verdict is that he is vitally needed in a day when the rising importance and scope of law and independent Courts and the organized profession are becoming more a part of every person's life. The ostensible defense that only lawyers would read that type of reporting overlooks the large body of informed laymen who anxiously desire to focus law intelligently with other human activities.

The need is not so much that reporting be improved on what might be called the "top level" such as the Supreme Court, for its activities are fairly competently recounted by Washington correspondents. Rather the requirement is that all down the line the reporting of Courts and legal activities be written and edited with some understanding of the impact of legal considerations. There is too much reporting of divorce cases on the "eating-crackers-in-bed" plane; there is too much reporting of criminal cases by over-emphasis on the judge's dramatic comments and counsel's grimaces. In many cases it is difficult even to determine what type of action is really involved. Judicial proceedings deserve some of the expert reporting which newspapers lavish on sports and science. Maybe lawyers need, too, to get, even vicariously for a few hours, some of the atmosphere and background of the reporting which so greatly influences modern life and thought. *Late City Edition* gives the chance.

THE PRESIDENT'S PAGE

TAPPAN GREGORY

▪ Today is Armistice Day, bright and frosty, reminiscent of another Armistice Day twenty-nine years ago.

We had been on the road most of the preceding night, struggling in and out of the mud, weaving through traffic jams, guiding forward our wagon with its load of telephone equipment, headed for our last P. C., in the little village of Mouzay on the east bank of the Meuse.

The guns were still grumbling and barking as they had grumbled and barked day and night during the seven weeks of the battle.

The men of the telephone detail were setting up a stove in the vaulted cellar used as telephone central and sleeping quarters.

The telephone officer sat at the switchboard.

Just then the drop on the brigade line fell and buzzed. The Adjutant spoke to the Colonel: "The Germans have accepted our Armistice terms effective at eleven o'clock and you will do no more firing."

Two hours of anxious waiting, then silence—strange, unaccustomed, complete silence—except for a brief interlude during the afternoon when the men fished in the canal with hand grenades.

Thus peace returned. And when this reaches you we shall be close once more to the holy days of the peace of Christmastide.

No cause is more urgent and vital today than the maintenance of peace.

Only if we are strong and wise and patient may we remain at peace. Then we shall not be molested and our voice will command attention in the councils of the nations.

* * *

By direction of the Board of Governors a new committee has been constituted on Legal Aspects of National Security. It will enable the Bar to make valuable contribution to the solution of many problems important to the Nation.

* * *

The Board also authorized the creation of a committee to concern itself with the difficult question of any recommendation or memorial to the Congress concerning title to tide-lands and the beds of navigable waters, as between Federal and State governments. The Assembly in Cleveland adopted a Resolution, as reported elsewhere in this issue, which put this subject up to the Board of Governors.

* * *

Section chairmen gathered in conference in Chicago immediately following the November Board meeting. They discussed with each other and with the members of the Board how best to carry on their respective tasks with the least possible overlapping, duplication or interference. They will meet again at the time of the Mid-Year Meeting to develop further their plans.

* * *

It is the aim of all that our labors be so directed that we may promote unified action as an American Bar Association—one closely knit organization, not a federation of autonomous sections.

* * *

As soon as the names of officers, council members and committee chairmen of the Sections are in hand our directory (the red book) will go to press. Practically all the material from headquarters is already in type. We have set November 26 as the deadline for the receipt of names for inclusion in the book.

We are hopeful that the annual report may be ready to be printed by the end of January but this depends upon the availability of paper.

* * *

Plans are under consideration for arrangement of meetings of Assembly, House and Sections at the Annual Meeting in Seattle looking to the closing of the meeting with the Annual Dinner on Thursday evening.

* * *

On December 6 and 7 the House Committee on Rules and Calendar will meet in Chicago and go forward in its important work on necessary changes to be recommended in Constitution and By-Laws.

* * *

Our budget is in balance. This was not accomplished without careful consideration, reconsideration, revision and debate and much disappointing paring of allowances for Sections and committees. Steadily mounting costs made this necessary. Income from dues is exceeding forecast, but the fact remains that with dues fixed at the nominal figure now set we fall far short of the amount of income sorely needed for carrying on our many important projects in broad fields of activity—projects covering things that we should do and must do if we are to maintain our present enviable position of influence in our own profession and in affairs of the world within our proper sphere.

* * *

I wish you all a Merry Christmas and a very happy holiday season and New Year.

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AMERICAN BAR ASSOCIATION
Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

Missing from our masthead is the name which for twenty-six years has "led all the rest"—the name of Edgar Bronson Tolman, Editor-in-Chief of the JOURNAL from the end of 1921 until his retirement last year, Editor-in-Chief Emeritus until his death on November 20. The vanished line of type will bring a sense of loss to his friends and co-workers throughout the country; it has a special sadness for those who long worked with him in the physical production of this magazine.

In the spring and summer of 1921, Stephen S. Gregory, of Chicago, an outstanding lawyer who had been President of our Association in 1911-12, put all that he had of strength and skill into the planning and creation of the JOURNAL as a militant monthly publication of the American Bar. After prodigious labor in preparing two issues, he died "in harness" in the work he loved, on October 21, 1921, as his seventy-first birthday neared. His friend and kindred spirit, Major Tolman, who had joined our Association in 1908 and had won distinction at the Illinois Bar, became Editor-in-Chief and also took charge of the "Review of Recent Supreme Court Decisions", which Mr. Gregory had founded and edited in his first issue. For more than twenty-six years this department has been a valued feature of the JOURNAL.

Major Tolman continued as our working Editor-in-Chief until our August number in 1946. First of all he was a practicing lawyer, intent on work for public and private clients; he was that until he died. Talents of legal scholarship were also his, with an aptitude and a zeal for devoting them to the interests of his profession and the improvement of the administration of justice. In 1935 he became the Secretary of the Supreme Court's Advisory Committee on Rules of Civil Procedure for the federal Courts; his labors in that field were prodigious and painstaking, to the end of his life. Lately he had worked on a draft "condemnation rule" for the Federal Courts (see our November issue, page 1109). In 1939 he was awarded the Gold Medal of our Association for his "conspicuous services to American jurisprudence."

In the summer of 1946 Major Tolman found that his editorial and administrative tasks for the JOURNAL impinged on professional and personal responsibilities which he could not lay down. In accepting his resignation, the Board of Editors expressed "its profound and sincere appreciation of the long-continued, self-sacrificing, uncompensated and distinguished service which Major Tolman has consistently rendered in that capacity, not only to the JOURNAL but also to his profession, the Courts and the public" (32 A.B.A.J. 389; July, 1946). He continued as Editor-in-Chief Emeritus and conducted his review of Supreme Court decisions.

When such a man passes from the councils of our Association, we think of his many services to it, of course. But the ascendant mood is one of poignant regret that all of us have lost a congenial friend, a wise and trusted adviser, a gallant gentleman who was a most agreeable companion, a lawyer who held high the standards of our profession.

■ *Judges and Lawyers Who Need Your Thought and Your Help*

As we sit in our heated, well-equipped law offices or comfortable homes with the Christmas season at hand, shall we give a thought, and some mead of assistance, to the lawyers and judges who are in the critical areas of the struggle for liberty and law, and are having to carry on their brave tasks under distressing conditions of privation and hardship, and are suffering from lack of the things which are essential to their well-being as well as to their work?

A challenging picture of the plight of judges and lawyers in devastated countries is given on page 000 of this issue. It is inspired by what our own Jacob M. Lashly saw and heard at first hand in Europe. His Committee offers us a four-fold plan for practical assistance to those who are fighting the good fight and keeping the traditional faith of lawyers in all lands. Their battle is for us as well as for themselves.

Judges and lawyers of France, Italy, Britain, Belgium, Holland, etc., and in the American, British, and French zones of Germany, do not need resolutions or speeches

of good cheer. They need food and clothing, law books and typewriters to replace those destroyed by bombs or fire or carried away by conquerors. They need to feel a restoration of their former ties of friendship and co-operation with the lawyers of America. During long years the lawyers and jurists of the Continent were isolated and oppressed by Nazi occupation. They have come to feel cut off from us; some tangible tokens of our interest and backing will gladden their hearts and spur their spirits.

Lawyers of America are indebted to Mr. Lashly for his journeying and to him and his associates for giving us this opportunity to do something helpful, something that might play a large part, in the decisive struggle which is taking place in Europe, far from our offices and firesides, yet must be of grave concern to all of us. As fast and as far as our Committee's plans are brought to the stage where individual action is practicable, we urge that all our members do what they can.

■ *Remedial Action as to Divorce Laws*

The National Conference on Family Life, to be held in the East Room of the White House next May, offers the opportunity to focus nationwide attention on efforts to clean up the scandals attending our divorce laws and their administration. Our Association is a sponsoring organization of the Conference, in respects limited to the laws affecting the subjects discussed. The directors of the Conference naturally look to our Association for wise guidance and expert draftsmanship as to the laws and legislation. Although the Conference will seek to focus public attention on the problems and "alert" the sponsoring organizations and the public to seek remedial solutions, no action will be taken to commit or bind any participating organization.

Problems of the divorce laws are much more than a matter of law. Actually, our statutes on the subject have grown up in haphazard fashion, perhaps largely for historical reasons, not related closely to moral or religious convictions. A new premise may be needed, as has been suggested by Reginald Heber Smith to the Conference, along challenging lines which he broaches in the *Atlantic Monthly* for December.

Many sincere people think that a national divorce law, following an amendment of the Constitution, is the only solution. Such a view is entitled to be heard and weighed. But no framer of the Constitution dreamed of divorce as a federal matter. Even if such an amendment and law could be adopted, such a centralization in federal power is a step to be resisted unless there is no other solution.

The lawyers and judges of America are face to face with a responsibility that is theirs. The people look to the lawyers and Courts, as does the Conference, for advice and leadership as to what should be done. It is a time for plain speaking, for the guidance of our Association's representatives in the Conference. What do *you* think should be recommended and done? What do you think of Mr. Smith's proposals? The columns of the JOURNAL are open to brief, constructive replies.

■ *Federal Action as to Housing*

When the Congress reconvenes in regular session on January 6, it will fulfill the emphatic views of a vast number of men and women of all parties if it gives the earliest practicable attention to the Taft-Ellender-Wagner bill or other legislation whereby the federal government will do its part toward relieving the acute and alarming shortage of homes for our people. We say this in behalf of all those whose health, comfort, and standards of living are destroyed by the long-continued lack of decent housing. We have particularly in mind, however, the younger men and women of our profession,

the lawyer-veterans and their families, who are being denied the chance to live decently and within their means, in the communities of their choice.

Some objectors say: Many of the States have done a competent job, as far as they could, on housing—why should the federal government step in and use its funds? Not merely because the emergency is Nation-wide and the need is great, affecting our own people. Most of all, because the federal government, through its political policies as to wage increases, price increases, the maintenance of taxes at oppressive war-time levels, the luring of labor forces away from basic industries producing materials for housing, the inexplicable failure for several years to foresee and provide for the critical conditions which were bound to arise when returned veterans sought homes for themselves and their families has been and is largely responsible for the crisis. Responsible lawyers who weigh their facts and their words have lately charged that a producing cause of the shortage and the high costs of homes has been the federal government's tolerance of monopolistic practices resorted to by labor organizations and building contractors.

What was done or omitted within the constitutional or war-emergency powers of government has brought American home-life to dangerous congestion and dire need. Cannot the same powers be invoked to relieve the shortage and the perils? It may even be salutary to use some of the proceeds of taxes for so direct and manifest a benefit to our own people. While we urge no particular measure or substance of legislation, we suggest that it would be difficult to convince the suffering young lawyers of America that Senator Taft's measure is "socialistic" or even "paternalistic". More and better homes at lower cost are imperative.

■ *John Bassett Moore*

We record with deep regret the death on November 12, in his eighty-seventh year, of the gifted legal scholar, great teacher of international law, and devoted friend of our Association, who was the first American elected to the World Court. We turn back with some satisfaction to the fact that, in "sunset years" while his mind was keen, we published a sketch of the career of this illustrious son of Delaware and an appreciation of his pre-eminent services to his profession, his country and the world (32 A.B.A.J. 575; September, 1946).

He lived and worked in generations of the great, and his associations were with men who were outstanding for character and capacity. During the first administration of Grover Cleveland as President, he entered the Department of State as a law clerk under Thomas Bayard as Secretary of State, sixty-two years ago. Soon he was helping Francis Wharton make a digest of international law, and became Third Assistant Secretary of State as the stepping-stone to a great career in law and diplomacy. He was the intimate adviser of great lawyers such as Cleveland and Benjamin Harrison as President, Bayard and James G. Blaine as Secretary of State. Although teaching and writing at Columbia had become his major interest, he assisted the State Department during the days of William McKinley as President and John Hay as Secretary of State; he was secretary and counsel for the Peace Commission which Mr. Justice William R. Day took to Paris to make the treaty to end the Spanish-American war; he was relied on greatly by Theodore Roosevelt and Elihu Root during critical issues as to the Panama Canal. In 1906 the Government published officially his monumental eight-volume *Digest of International Law*.

In 1913 President Woodrow Wilson persuaded him to return to the State Department to "fortify" William J. Bryan as Secretary of State. He enjoyed pleasant relations with both, but disagreed with the President's policies, and said: "The more I saw of Bryan the more I thought of him; the more I saw of Wilson the less I thought of him." His labors in behalf of international arbitration having been outstanding, he was elected in 1921 to the new Permanent Court of International Justice, on the advice of Elihu Root, who had told his friends in European chancelleries that Mr. Moore "would be much more useful than I". Judge Moore's services to the Court until 1928 were immeasurable.

As his official biographer, Professor Edwin Borchard, of the Yale Law School, made clear in our columns in September of 1946 (pages 579-582), Judge Moore was never happy as to the policies of his country which led to World Wars I and II or as to what took place between those wars. He had given his life to the peaceful adjudication of international disputes and to international law, which he defined as "a body of rules common to all nations, equally binding upon all and impartially governing their mutual intercourses". He saw "common rules" and the ways of peace flouted in two wars, peace settlements improvised by the inexpert on bases that could not last but only provoke new insecurity and strife; he saw the politically-minded leaders of nations, including his own country, neglect the World Court and turn recklessly away from the paths which Hay and Root and a host of others along with himself had so laboriously built as the ways to peace and law. Much that he had feared and predicted came tragically to pass.

During years of impromptu diplomacy and dangerous changes, his voice was always for reason and understanding, for avoidance of the causes of war. He was the shining exemplar of the American lawyer in international affairs; he embodied a great integrity in scholarship and in his personal life, a tradition that thorough training and tested aptitude are required for representing our country in its relationships with other nations.

We shall remember him, too, as a genial friend and a staunch believer in the work of our Association. He became a member in 1889, before many of its present leaders were born. According to the records of the Association no lawyer now living joined it before he did. Memory of him is a heritage of our profession.

Editorials

From Members of Our ADVISORY BOARD

■ The Country Lawyer Looks at Regulation

The "country lawyer" need not necessarily practice in the country. He may be located anywhere. But he is not too long removed from the grass-roots, and his derivation is usually pretty close up to pioneer stock. His practice is sufficiently general to keep him rubbing elbows with a wide variety of people. All this contributes to an intense feeling of independence, and makes him impatient and fretful under restraint and regulation.

As the country lawyer looks back over what the American people have been subjected to during the past several years, in the way of many ill-conceived and mal-administered regulatory schemes and practices which it is not necessary to enumerate here, he is reminded of the bumblebee in his experience with the bull. By way of saving the use of many otherwise necessary words in detailed explanation, the highlights of the story are: The bumblebee, it is said, was sitting on a daisy, when a bull came along cropping the grass. As the bull grazed nearer and nearer, the bumblebee, in defense of his daisy, repeatedly threatened to sting him, but the threats had no effect on the bull, and finally he cropped off the daisy with the bumblebee on it. The bumblebee thought he would surely sting the bull then, but it was nice and warm where he was, and he went to sleep; and when he woke up the bull was gone.

How often has the country lawyer awakened in the past fifteen years with a feeling that the bull was just "fresh gone"!

Even the plans and schemes devised for his regulation and regimentation that may be deemed worthy in purpose have generally bogged down in their implementation, through incompetent and inefficient administrative machinery, practice and personnel. And the end is not yet. He is still groping through the "Milky Way" of orders, directives and inter-office memoranda with their seven or more carbon copies, broadcast from ivory towers by impractical professional do-gooders. He is confused, discouraged and mad.

These few words, with their plain, between-the-lines implications, should indicate to the thoughtful how the country lawyer looks at regulation. Is he alone?

CLARENCE M. BOTTS

Albuquerque, New Mexico

■ The Delay and Cost of Justice

Tersely and trenchantly the Lord Chancellor of Great Britain summarized in Cleveland two important problems in the administration of justice by saying: It takes too long and it costs too much.

Does not the organized Bar face these problems with too much defeatism? Now and then a novelist, a journalist, or someone with perhaps a more detached vantage point than a judge or a lawyer needles the Bar into action and so into progress.

For a democratic society to function effectively, an agency upon which a responsibility rests must discharge its duties with full regard for the improvement of the society of which it is an integral part. A Bar Association is an integral factor in our modern social fabric. Upon the organized Bar rests the responsibility of expediting constantly and of making the processes of justice more efficient at a decreasing cost.

Today in most of our forty-eight States, the processes of justice do take too long. Over the nation, the cost to litigants is too high. These problems are for the organized Bar to solve. In Chicago, the press is engaged in a campaign to publicize some of the deficiencies of the judicial system. In Denver, the organized Bar has embarked upon a program designed to increase the efficiency of the judicial process.

The Los Angeles Bar Association has successfully persuaded the Superior Court to abandon an antiquated seniority system previously utilized in selecting its presiding judge.

Such action is encouraging, but probably is inadequate in scope. A State which has a self-governing Bar has an especial responsibility and a peculiarly efficient mechanism with which to attack and meet such problems. A congested urban population creates multitudinous problems of administration in a post-war society. These conditions are challenges to action rather than excuse for inaction.

Conditions involving congested calendars, delayed trials, procrastinating lawyers, and a lazy bench are susceptible of study and correction. Appropriate and penetrating studies should be made to determine the causes of delayed justice. Then the organized Bar should utilize all its energy in remedying such causes. Requiring a litigant to wait a year for a trial or hearing may in effect be a denial of speedy justice, perhaps of due process.

Once the causes for delayed justice are known, solutions can be found. The organized Bar is an adequate mechanism to accomplish this result.

JAMES C. SHEPPARD

Los Angeles, California

Editor to Readers

■ The "back pages" of this issue contain, as usual at the end of the year our "topical index" of the contents of the JOURNAL during 1947. Our readers may be glad to keep this in mind as the convenient means of finding some article or news report to which they wish to refer in months to come. In large part this index supplements the review of the work of the Association year 1946-47 which also is elsewhere in this issue.

"The axe has fallen." Increased costs of printing and paper supply have compelled us to cut down the number of pages contained in an issue of the JOURNAL. This requires even more rigorous condensation of many articles and items which may have advantages for our readers. Unfortunately it compels also the omission of many articles and news items which we had hoped to publish. Our unpleasant task is the early return of many attractive manuscripts which we had held in the hope of a better "break" on printing costs.

* * * * *

We suggest that each of our readers may well make a note now that the 1948 Annual Meeting will be held in Seattle, in the State of Washington, and will open on Monday morning, September 6. The end of 1947 is not too early to make a resolve, and to begin to make family plans, to attend in Seattle if you can. Those of our members who have ever been in Seattle, and have enjoyed the hospitality of its lawyers and have beheld the glorious scenery of the mountains, plains and seashore of the State, will realize that they will miss much if they do not come. Those who have never been in Seattle and Washington State have a great opportunity open to them. Lawyers form the most valued and lasting friendships in those years when our Association meets on the West Coast and the train journeys give a chance for more than casual acquaintance. A vacation in the Pacific Northwest is unforgettable. Besides, this meeting will be chock full of interest and spirit.

* * * * *

This issue contains the summary of the proceedings of the five sessions of the 1947 Assembly in Cleveland, supplementing what had been published in our October and November issues. For lack of space because of our enforced reduction in the number of our pages per issue, the publication of the summary of the Cleveland proceedings of the House of Delegates is deferred until our next issue.

* * * * *

At the enjoyable dinner given on November 7 in Chicago by the Illinois State and Chicago Bar Associations to the judges of the Supreme Court of the State, President Erwin W. Roemer, of the Chicago Bar Association, brought to attention the unusual coincidence—hardly the word—that Stephen S. Gregory and his son Tappan had each achieved the "grand slam" of professional recognition by their brethren of the Bar: Father and son were each the President of each the Chicago Bar Association, the Illinois State Bar Association, the Law Club of Chicago, and the American Bar Association.

* * * * *

Greetings and felicitations go to the Law Society of Upper Canada, which recently celebrated its 150th anniversary with appropriate exercises in Osgoode Hall, Toronto. It was during the second session of the second Provincial Parliament of Upper Canada in 1797 that a statute was passed that it should be lawful "for the persons now admitted to Practice in the Law and practising in any of His Majesty's Courts of this Province, to form themselves into a Society to be called the Law Society of Upper Canada." The Society was formed later in 1797. In 1828, the Society bought six acres of land, then virtually "out of town", for the "permanent seat" of the Society, to be known as Osgoode Hall, the first Law Center of this Continent. The first section of the building was finished in 1832, and the Court of the King's Bench sat there, as Courts of the Province have done ever since. Through its august Benchers, now numbering fifty-eight, including Benchers *ex officio*, the Society has administered the legal education, the calling to the Bar, and the discipline of the profession, with a fine record of effectiveness over the years. The first woman solicitor was admitted in 1893; more than 125 women have followed her. The Society now has some 4000 members, barristers and students. The Law Society, the Law School, the Courts, the Law Library, etc., are centered in Osgoode Hall, which has played a large and honorable part in the progress of the profession of law in the Province of Ontario and throughout Canada.

* * * * *

The JOURNAL has several times pointed out that speakers and writers in America (including lawyers) often inveigh against Communism and collectivism in broad, ponderous generalities and rarely explain its fallacies and perils in terms understandable by the average man and woman. Occasionally some publisher or analyst "gets down to brass tacks" and states things plainly, as was instanced by the brilliant, very readable little book called *The Animal Kingdom,* which is well worth obtaining in its American edition. In St. Paul, Minnesota, the Catechical Guild recently published *Is This Tomorrow?,* which takes Communism apart after the manner of comic-strips that tell its story to adults and youngsters who will not read dry pages of argument. The *Daily Worker* promptly denounced the book, with the usual result that the publishers have great difficulty in filling the volume of orders.

* * * * *

In the Miami *Daily News* for November 4, its redoubtable columnist, Miss Grace Wing, devoted her column "On the Wing" wholly to summarizing and quoting from Walter P. Armstrong's sketch of "Private" John Allen in our October issue (page 990)—the Mississippi lawyer who was a charter member of our Association and had "the saving grace". Miss Wing concludes, anent Allen, that "it's always handy to have around a man who can turn away tyranny with a joke and a laugh and banish distrust by straight-forward dealing." She says that the article was brought to her by "Colonel" Robert H. Anderson, of the Florida Bar, member of our Association since 1923. Incidentally, that is the way in which JOURNAL articles best receive space and comment in local newspapers—when they are brought to the attention of an editor or local columnist by a member of our Association.

Review of Recent Supreme Court Decisions

by **Edgar Bronson Tolman***

PUBLIC OFFICERS

Liability of Government Officials to be Sued Without Consent of Government

Land v. *Dollar*, 91 L. ed. Adv. Ops. 903; 67 Sup. Ct. Rep. 1009; U. S. Law Week 4423 (No. 207, decided April 7, 1947).

The Dollar Line interests brought suit in the District of Columbia against members and former members of the Maritime Commission to recover certificates of stock in The Dollar Steamship Lines, Inc., Ltd. The plaintiffs alleged that the stock was merely pledged as security for a debt, and demanded return of the same. The Maritime Commissioners asserted that the transfer of the stock was an outright conveyance and that hence plaintiffs were not entitled to a return of the stock. The District Court dismissed the complaint, as a suit against the United States, to which the latter had not consented. The Court of Appeals reversed. On certiorari the latter ruling was affirmed by the Supreme Court. Mr. Justice DOUGLAS delivered the opinion of the Court.

The ruling is based largely on *United States* v. *Lee*, 106 U. S. 196. The opinion states that "public officials may become tort feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

Mr. Justice REED concurred, but expressed the view that the Commission was an indispensable party and should be joined.

Mr. Justice BLACK did not take part. H.

The case was argued by Mr. Paul A. Sweeney for Land, and by Mr. Gregory A. Harrison for Dollar.

TAXATION

Property Tax Upon Trust with Resident Trustee

Greenough v. *Tax Assessors of Newport*, 91 L. ed. Adv. Ops. 1274; 67 Sup. Ct. Rep. 1400; U. S. Law Week 4625 (No. 461, decided June 9, 1947).

This case was a challenge of a $50 personal property tax assessed by Rhode Island upon one-half of the value of the corpus of a testamentary trust. The decedent died a resident of New York, where his will was duly probated, letters testamentary issued, and letters of trusteeship granted to two testamentary trustees. The trustees held corporate stock for a New York life beneficiary and undetermined remaindermen. The stock certificates were at all times in New York. One of the trustees resided in New York. The other resided in Rhode Island, but never exercised his trusteeship powers there. Under the Rhode Island statute, as interpreted by the state Court, intangible personal property held by a resident trustee is subject to tax; if the Rhode Island resident is co-trustee with a nonresident, then one-half the value of the trust is taxable. The trustees contended that such a tax violated the due process clause, but the tax was sustained by the Rhode Island Supreme Court.

The judgment was affirmed in an opinion by Mr. Justice REED.

The opinion notes first that the tax was attacked only on the ground that "it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which that state does not give protection or benefit"; and that the trustees disclaimed reliance upon the argument that the tax exposed them to danger of other *ad valorem* taxes in another state. The question therefore is solely the *power* of the state to levy a tax based upon the residence of a trustee. "Neither the expediency of the levy nor its economic effect on the economy of the taxing state is for our consideration."

It is conceded that, under the cases, the state of residence may not tax tangible property permanently located outside the state. Nevertheless, this principle does not prohibit the taxation of intangibles by the state of the owner's residence, even though the "documents of owner interest" are outside the state. The Rhode Island law is analyzed to show that the trustee has rights of bringing suit which result from his residence there. "Consequently, we must conclude that Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles."

Mr. Justice JACKSON delivered a dissenting opinion, in which Mr. Justice MURPHY joined. This dissent apparently would concede the validity of the tax if it were imposed upon the Rhode Island trustee individually, even though the trustee might have been entitled to reimbursement from the trust. It is contended, however, that a direct tax upon the trust assets is invalid.

In a separate dissent, Mr. Justice RUTLEDGE and the CHIEF JUSTICE agree with the dissenting opinion of Mr. Justice JACKSON, except that they refuse to intimate an opinion as to the validity of a tax upon the trustee individually.

*Assisted by James L. Homire and Mark H. Johnson.

Mr. Justice FRANKFURTER delivered a separate concurring opinion, emphasizing that a tax is valid if measured by the wealth which a resident controls, whatever his ultimate beneficial interest in the property. J.

The case was argued by Mr. Greenough, and Mr. William R. Harvey for Greenough, and by Mr. John C. Burke for the Tax Assessors.

Federal Income Tax—Dividends—Recapitalization—Purpose Test

Bazley v. *Commissioner,* 91 L. ed. Adv. Ops. 1330; 67 Sup. Ct. Rep. 1489; U. S. Law Week 4642 (Nos. 287 and 209, decided June 16, 1947).

The opinion disposes of two cases involving similar facts. In both, the taxpayer contended that debenture bonds were received in a non taxable "recapitalization", whereas the Commissioner argued that the securities were taxable as a dividend. In the *Bazley* case, the corporation had outstanding 1000 shares of $100 par stock, all except one share being owned by the taxpayer and his wife. The corporation adopted a plan of reorganization whereby each share of old stock was exchanged for five new shares of no par stock having a stated value of $60 per share, plus debenture bonds of the face value of $400. The corporation had an earned surplus in excess of the face amount of the debentures. The *Adams* case involved substantially the same kind of transaction, except that the recapitalization did not result in the capitalization of earnings. The Tax Court held in both cases that the debentures were taxable as dividends, and both cases were affirmed by 3-2 decisions of the Third Circuit.

The decisions were affirmed in an opinion by Mr. Justice FRANKFURTER. The opinion notes that the decisions below were based upon findings that the recapitalizations had "no legitimate corporate business purpose", a purpose which the lower courts held must exist independently of a business purpose to the stockholders. Mr. Justice FRANKFURTER apparently deprecates this distinction, but sustains the result on somewhat similar reasoning. Here, the opinion points out, the bonds would have been clearly taxable as a dividend if issued alone. Therefore the transaction can not be immunized as a recapitalization merely because there was an "unrelated modification of the capital account." The opinion emphasizes the fact that all the securities were held by a family, and that the new debentures could have been redeemed for cash immediately after the transaction in question.

Noting that Congress had attempted no definition of recapitalization, the opinion expressly refused to go further than a decision on the facts of the present cases.

Here, the opinion points out, "Nothing was accomplished that could not have been accomplished by an outright debenture dividend. . . . A 'reorganization' which is merely a vehicle, however elaborate or elegant, for conveying earnings from accumulations to the stockholders is not a reorganization under §112".

Mr. Justice DOUGLAS and Mr. Justice BURTON dissented for the reasons stated in the dissenting opinions below. J.

The cases were argued by Mr. Henry S. Drinker for Bazley, and Mr. J. Louis Monarch for Commissioner in 287; and by Mr. Sidney A. Gutkin for Adams, and Mr. J. Louis Monarch for Commissioner in 209.

Federal Income Tax—Indirect Sale to Related Taxpayer via Stock Exchange

McWilliams v. *Commissioner,* 91 L. ed. Adv. Ops. 1383; 67 Sup. Ct. Rep. 1477; U. S. Law Week 4669 (Nos. 945, 946 and 947, decided June 16, 1947).

The taxpayers were husband and wife. The husband had for a number of years managed the large independent estate of his wife, as well as his own. On several occasions during the taxable years he ordered his broker to sell certain stock for the account of one of the two, and to buy the same number of shares of the same stock for the other, at as nearly the same price as possible. He told the broker that his purpose was to establish tax losses. On each occasion the sale and purchase were promptly negotiated through the Stock Exchange, and the identity of the persons buying from the selling spouse and of the persons selling to the buying spouse was never known. Invariably, however, the buying spouse received stock certificates different from those which the other had sold. The taxpayers filed separate income tax returns for these years, and claimed the losses which he or she sustained on the sales as deductions from gross income. The Commissioner disallowed these deductions on the authority of §24(b) of the Internal Revenue Code, which prohibits deductions for losses from "sales or exchanges of property, directly or indirectly. . . between members of a family," and between certain other closely related individuals and corporations. The Tax Court sustained the taxpayers, but the Circuit Court reversed.

In an opinion by the CHIEF JUSTICE, the losses were held not deductible.

The opinion holds that the *Dobson* rule does not preclude a reversal of the Tax Court's decision, because the issue is solely one of statutory interpretation.

Mr. Justice BURTON took no part in the consideration or decision of the cases. J.

The case was argued by Mr. John A. Hadden for McWilliams, and by Mr. Arnold Raum for Commissioner.

Employment Taxes—Distinction Between Employee and Independent Contractor

United States v. *Silk,* 91 L. ed. Adv. Ops. 1335; 67 Sup. Ct. Rep. 1463; U. S. Law Week 4646 (Nos. 312 and 673, decided June 16, 1947).

Two taxpayers sought to recover taxes paid by them as employers under the Social Security Act. The taxpayers contended that the persons with respect to whom the taxes were paid were not employees but independent contractors. The District Court in each case held for the taxpayer, and both decisions were affirmed by the respective Circuit Courts of Appeals.

In the first case, the taxpayer Silk was an individual engaged in the re-

tail coal business. Two classes of employees were involved. Unloaders were paid an agreed price per ton to unload coal from the railroad cars. They furnished their own picks and shovels and worked when they pleased. Truckers were paid by Silk to deliver the coal at a uniform price per ton. They furnished their own trucks and helpers, worked for others as they pleased, and no record was kept of their time.

In the second case, the taxpayer Greyvan Lines, Inc., was an interstate common carrier by motor truck. The question was whether its truckmen were employees. Those truckmen were required by contract to work only for Greyvan and were subject to a large amount of control. They, however, owned their own trucks, hired their own helpers, and were paid a percentage of the tariff charged.

The Court held, in an opinion by Mr. Justice REED, that the Silk unloaders were employees, but that both the Silk and Greyvan truckmen were independent contractors.

The opinion analyzes the statutory history and structure. "This relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence." The term "employee" is therefore to be construed to accomplish the purposes of the legislation, and the interpretation must not be "constricted." The presence or absence of a "power of control" is not decisive. The question is whether the person is an employee or an independent contractor in the "industrial situation".

The opinion concedes that no "rule of thumb" is applicable. "The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." As to the unloaders in the Silk case, however, the Court finds that their investment and responsibility fall short of independence. "They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. . . They are of the group that the Social Security Act was intended to aid." The truckmen, on the other hand, are "small businessmen". "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY stated that they agreed with the applicable principles announced in the majority opinion, but that they believed that these principles require a holding that all of the persons involved were employees.

Mr. Justice RUTLEDGE was of the opinion that the cases should have been remanded to the District Courts for decision in conformity with the principles announced in the majority opinion. J.

The case was argued by Mr. Robert L. Stern for United States and Harrison in 312 and 673, and by Mr. Ralph F. Glenn for Silk in 312 and Mr. Wilbur E. Benay for Greyvan Lines in 673.

State Income Tax—Impairment of Contract—Distinction Between Property Tax and Income Tax—Effect of State Court Interpretation

Atlantic Coast Line R. Co. v. *Phillips,* 91 L. ed. Adv. Ops. 1538; 67 Sup. Ct. Rep. 1584; U. S. Law Week 4732 (No. 385, decided June 23, 1947).

The taxpayer railroad contended that the Georgia income tax was invalid as to it because it impaired the obligation of an 1833 statute which granted certain tax immunity in connection with the charter of the company. The statute stated, "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads or any of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments." The Supreme Court of Georgia sustained the tax.

The judgment was affirmed in an opinion by Mr. Justice FRANKFURTER.

The opinion notes that the state Court reached its decision by finding that the tax exemption of the charter related merely to the limits to which a tax on the railroad property could be levied, such a property tax to be measured so as not to exceed one-half per cent of the net earning power of the properties; the exemption was not concerned with what we now know as a corporate net income tax and therefore did not bargain away the power of the legislature to impose such a tax.

Mr. Justice FRANKFURTER acknowledges that "a claim that a state statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a state Court's determination whether there was a contract or what were its obligations." Nevertheless, the Court should be slow to depart from the local Court's judgment in such matters of local policy as a system of taxation.

The opinion then traces the early history of income taxation to show that income taxes as such were virtually unknown in 1833. The statute contemplated merely a property tax measured by income, not a "candid, conventional income tax" such as was presently in issue. Since tax exemption is to be strictly construed, this distinction is sufficient to sustain the present tax.

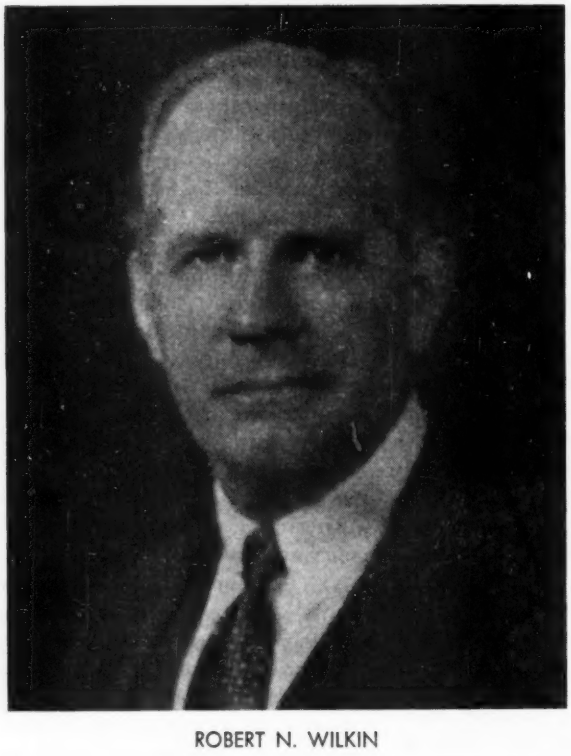
The opinion contains an interesting statement of "tax ethics", which may transcend in importance the specific issue in the case. "As to the astuteness of taxpayers in ordering their affairs so as to minimize taxes we have said that 'the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.' *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, 395-96. This is so because 'nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary

contributions.' Learned Hand, C.J., dissenting in *Commissioner* v. *Newman*, 159 F. (2d) 848, 851. Conversely, the State, insofar as it may limit its basic power to tax to enable government to go on, can sail as closely as astuteness permits to the line of an immunity from such exaction."

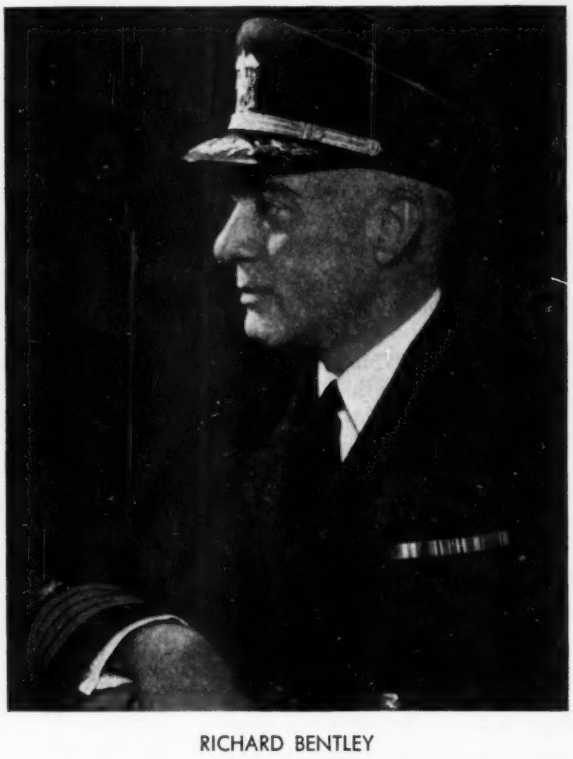
J.

The case was argued by Mr. Carl H. Davis and Mr. T. M. Cunningham for the Railroad Company, and by Mr. Claud Shaw and Mr. Victor Davidson for Thompson.

Judge Robert N. Wilkin and Richard Bentley Elected to Board of Editors



ROBERT N. WILKIN



RICHARD BENTLEY

■ At the meeting of the Board of Governors in Chicago on November 7, Judge Robert N. Wilkin, of Cleveland, Ohio, was elected to the Board of Editors to fill the unexpired term of Thomas B. Gay, of Richmond, Virginia, who resigned; and Richard Bentley, of Chicago was elected for a five-year term in one of the two additional places created by the action of the House of Delegates in Cleveland on September 25. Both elections were unanimous. As announced in our November issue (page 1079), Professor James E. Brenner, of California, was elected on September 26 to fill the other of the two new posts.

The retirement of Mr. Gay was accepted with sincere regret by the Board of Editors and the Board of Governors, along with deep appreciation of his long and faithful service. While he was Chairman of the House of Delegates he was for three years an *ex officio* member of the Board of Editors, and he has since served six years as an elective member. During the years of steady planning and work to improve the JOURNAL, his contribution has been invaluable; but with the principal features in that re-vamping and reorganization accomplished, his burden of professional work led him to feel that he should retire.

Judge Wilkin was born in New Philadelphia, Ohio, in 1886. He received his LL.B. degree from the University of Virginia in 1908, and later did post-graduate study at Harvard. Admitted to the Bar of Ohio in 1908, he practiced law in his home town, was a member of the State Board of Bar Examiners and the Judicial Council of Ohio, served on the Supreme Court of his State for a year, and then returned to the practice of law. In 1939, he was appointed a United States District Judge for the Northern District of Ohio, and has made a national reputation as a jurist and legal scholar.

He is a trustee of Oberlin College and Western Reserve University, has been a member of our Association

(Continued on page 1223)

Lawyers in the News

Seth W. RICHARDSON

■ The United States Civil Service Commission on November 8 created and appointed a Loyalty Review Board of twenty members to hear appeals involving individual employees of the federal government who have been dismissed since October 1 because of accusations or suspicions that they have been disloyal to the United States or are bad security risks. Sixteen of the twenty members of this outstanding tribunal are lawyers; eleven of them are members of our Association, several of them long active in it.

Named as chairman of the new board to fulfill the American tradition of fair play is SETH W. RICHARDSON, formerly of Iowa (where he was born in 1880) and of the Wisconsin, North Dakota and District of Columbia Bars. He came to Washington as Assistant Attorney General of the United States under President Hoover in 1929, and has served as counsel in many important investigations, including the Pearl Harbor inquiry. He was appointed to the United States Circuit Court of Appeals for the Eighth Circuit by President Hoover in February of 1933, but the Senate did not act on the nomination before President Roosevelt took office. He has been since July 1, 1933, a member of the law firm headed by Donald R. Richberg in Washington. He became a member of our Association in 1936. A sketch of him was in our March, 1946 issue (page 147).

As we read the Commission's directives and the President's "loyalty" order of last March 22, employees aggrieved will have a right to resort to this Review Board after they have utilized the two procedures provided within their own department or agency. The Review Board does not give an appeal as of right to employees dismissed by summary procedure from the State Department or other "sensitive" agencies, but the Board may investigate and certify their fitness for new employment in agencies not considered to be so "sensitive". The "advisory recommendations" of the Review Board will be a safeguard against vindictiveness and hysteria.

In addition to the Chairman, fifteen of the other nineteen members of the board are the following lawyers with the years in which those who are members of our Association became such shown in parentheses:

George W. Alger (1925), of New York, noted lawyer, author, and leader in Bar Association work and civic affairs, who has served as State Commissioner under various Governors to investigate insurance, prisons, etc.; last contributed to the JOURNAL a book review of *The Cravath Firm and Its Predecessors.* (See our May issue, page 480).

John Harlan Amen, of New York, special prosecutor in numerous cases in his city and State, associate counsel for the United States at Nuremberg.

Harry A. Bigelow, Professor and Dean Emeritus at the University of Chicago Law School.

John Kirkland Clark (1917), of New York, member of the House of Delegates since its establishment in 1936; long active in many branches of our Association's work; has served as commissioner, referee, or special master in important cases and special counsel in many investigations. A sketch of him was in our May issue (page 488).

Harry W. Colmery (1938), of Topeka, Kansas, Past National Commander of the American Legion.

Tom J. Davis (1921), of Butte, Montana, former president of Rotary International.

Burton L. French, now of Oxford, Ohio, for many years a member and a Republican leader in the Idaho House of Representatives and the National House of Representatives; now Professor of Government at Miami University.

Earl G. Harrison (1930), professor and dean at the University of Pennsylvania Law School; last contributed to the JOURNAL a discussion of the *Girourd* decision as to the naturalization of alien applicants. (See our June issue, page 540).

Garrett H. Hoag, of Boston.

Wilber LaRoe, Jr. (1938), of Washington, D. C., Moderator of the Presbyterian Church, U. S. A., former chief examiner of the Interstate Commerce Commission.

Henry Parkman, Jr. (1930), of Boston, brigadier general in World War II; recently completed service with AMG in Germany.

Albert M. Sames (1919), judge of the United States District Court in Arizona, 1931-47.

Charles Sawyer (1921), Ohio lawyer and political leader; former Ambassador to Belgium.

Murray Seasongood (1914), of Cincinnati, member of the House of Delegates, long active in many phases of our Association's work; a National leader for civil service reform and legal aid; former Mayor of Cincinnati. A sketch of him was in our March issue (page 273).

Henry L. Shattuck (1911), of Bos-

ton, member and leader in the Massachusetts House of Representatives, senior Fellow of Harvard College since 1938, active in State and local Bar Associations, authority and author on the law of fiduciaries.

Arthur T. VANDERBILT

■ An announcement that is being received with mingled feelings of gratulation and regret, on the part of lawyers throughout the country, is that ARTHUR T. VANDERBILT has become the Chief Justice of New Jersey under its new Constitution which was adopted by a decisive vote of the people of the State on November 4, and which has as its outstanding feature a judiciary article which as of September 15 will put in effect a complete reorganization of the State's judicial system along lines in accord with the best American experience. The gratification that a jurist of qualifications so pre-eminent has been entrusted with a task of Nationwide significance is ascendant. The regrets are that the burdens of his new duties will enforce his retirement from many other projects in which he has been rendering such great service to our profession and the public.

As Chief Justice, VANDERBILT will have full charge of that reorganization, the drafting of rules for all Courts of the States, the assignment of judges, and, through an Executive Director of the Courts under him, the administration of the State's judicial system. He has given great amounts of time and energy since 1930 to the advocacy, against much political opposition, of such a reorganization of New Jersey's judiciary, the unification of its trial Courts, the introduction of a single Court of final appeals, the re-writing of ancient and unwieldy rules that had long been neglected, particularly in the Courts of Justices of the Peace and the minor Courts within cities. He will also have charge, at Governor Driscoll's request, of the revamping of the State's administrative agencies and their integration with the State's judicial system.

When the people voted overwhelmingly for such a modernization of the State's judicial system, the Governor turned naturally to Dean VANDERBILT to take charge of and do the job in a manner in full sympathy with the objectives. Although overwork in many tasks brought VANDERBILT a sharply admonitory illness last May and compelled him to spend the summer in rebuilding his health, he returned to work this fall in improved condition and plunged anew into many tasks. His acceptance of the judicial post was due to his feeling that he could not refuse to carry out what he had long advocated in his State. Governor Driscoll said on October 31 that VANDERBILT was appointed "in order that a man of his extraordinary experience as a lawyer, student of jurisprudence, judicial procedure, and judicial structure, may be available" for the office of Chief Justice.

In order to be eligible for the appointment as Chief Justice, Dean VANDERBILT took office as a Circuit Judge on November 3. Subsequently appointed as Chief Justice, he will devote his time until next September to preparing the plans and rules which can be put into effect on September 15. He will take no trial-term or other judicial assignments meanwhile. He will continue as Dean of the New York University Law School until the end of the present school year (next June).

On November 21 VANDERBILT sent to Judge Orie L. Phillips, Chairman of the independent Council in charge of the Survey of the Legal Profession, his resignation as Director of the Survey, for which the preparatory plans have been well advanced (see our November issue, page 1075). It is hoped that his duties as Chief Justice will not preclude his continuance as a member of the Council for the Survey. He had been the unanimous choice of the Council as Director; his resignation creates a vacancy which it will be difficult to fill.

VANDERBILT's career at the Bar and in the work of our profession has been one of the most dynamic and useful in the history of our Association. At the age of 50 he was President of our Association in 1937-38, and has ever since continued his services to jurisprudence and his leadership for improving the administration of justice. His labors to correct abuses in administrative law and procedure have borne fruit. He was the Chairman of the Supreme Court's Advisory Committee which produced the new Federal Rules of Criminal Procedure and Chairman of the War Department's Advisory Committee on Improving Military Justice, although its recommendations, supported by our Association, have thus far been put into effect only in part. He has pioneered for a "Law Center" at New York University, and inaugurated a notable Citizenship Clearing House in cooperation with our Association's Committee on Lawyers' Participation as Citizens in Public Affairs. (See our November issue, page 1086). He was the inspiration and founder of the *Annual Survey of American Law*, which is currently being reviewed in our columns by Dean Roscoe Pound, and of the *Annual Survey of New York Law*, which is announced elsewhere in this issue.

Absorption in his judicial duties will preclude him from most of his vital and far-flung activities in our Association and in the School of Law which he was bringing to rank with the best; but, at a time when thorough-going further improvements in the judicial systems of our States impend, the constructive reforms which he will inaugurate in New Jersey will have Nationwide effects.

Sylvester J. RYAN

■ The President of the Bronx County Bar Association (New York City), Assistant District Attorney in the Bronx since 1924, and Chief Assistant since 1933, has been appointed by President Truman as a United States District Judge for the Southern District of New York, to succeed Judge Francis C. Caffey, who retired at the age of 70. The appointment of RYAN, who took office on November 10, was recommended by the lawyer-leader of the Democratic organization in Bronx County, Edward J. Flynn (author of *You're the Boss*), whose previous recommendation for an appointment to the same Court was not followed in view of the President's decision to name Judge Harold R. Medina, supported by no party chieftains but vigorously by the Bar Associations (see our June issue, pages 537-539).

RYAN is a native of the Bronx, where he was born 51 years ago. He is a graduate of City College and the Fordham University Law School. Admitted to the Bar in 1918, he was in private practice until he joined the District Attorney's staff. Our Association's Committee on the Judiciary has not acted on the nomination or confirmation. Concerning Ryan's nomination, President Harrison Tweed of the Association of the Bar of the City of New York, said on November 1, in part:

> Sylvester Ryan is well qualified to serve as United States District Judge for the Southern District of New York, which includes New York and the Bronx.
>
> He has established a reputation as a fair and fearless prosecutor and a hard worker. Prior to his appointment as Assistant District Attorney, Mr. Ryan spent ten years in the office of the late Judge Olcott, where as office boy, law clerk, and associate of Judge Olcott's firm, he received intensive training in general practice, including trials and appeals in the State and Federal Courts and tax and bankruptcy matters.
>
> Though Mr. Ryan has devoted most of his time for the last twenty-three years to the preparation and prosecution of criminal cases, he was permitted to and did engage in outside civil practice not inconsistent with his official duties. All of the judges and lawyers known to Mr. Ryan and interviewed by members of the Committee on the Judiciary spoke highly of his character and of his capacity for judicial office. In our opinion he should be an able, patient, and courteous judge.
>
> It is fortunate that the President has made another good appointment to the Federal Court of this District. As stated by Senior District Judge John C. Knox on many occasions, the need for additional highly qualified District Judges is serious. . . . It is hoped that Judge Knox's appeal for more judges will be heard and that effective action will be taken promptly after the Congress reconvenes. When other appointments are made, we are hopeful that the standard established by the recent appointments of Judge Medina and Mr. Ryan will be maintained and that the principle of nonpartisanship will be observed.

RYAN's appointment continues unbroken the practice of appointing only members of the President's party to district judgeships, even in districts which are Republican, as is the Southern District of New York. Meanwhile, Congressman Benjamin L. Rabin, of the Bronx, who was passed over in favor of Judge Medina, was nominated by the chieftains of his party for election to the Supreme Court for New York and Bronx Counties, in opposition to Judge Lombard, appointed by Governor Dewey. The Committee on the Judiciary in the Association of the Bar reported that both were "well qualified". By a narrow vote, a meeting of the Association declared in favor of the election of Judge Lombard, although he had accepted American Labor party endorsement, which Leader Flynn's candidates had spurned because it was said to be Communist-controlled. Rabin was elected by a substantial plurality, and thus has a fourteen-year term on the State Supreme Court at $25,000 a year instead of life tenure at $15,000.

Washington D. BRANDON

■ Who is in years the oldest lawyer in active practice in the United States? According to the records of our Association, he is WASHINGTON D. BRANDON, of Butler, Pennsylvania, who celebrated on November 1 his one-hundredth birthday. He is still in good health and amazing spirits, despite the impairment of his hearing. He comes regularly to his office and takes an active part in the law work of his firm and the business life of his community. A banquet in his honor was given by the Butler County Bar Association on his birthday, with judges and lawyers from fourteen counties of the State in attendance. Congratulatory messages were received from Chief Justice Vinson, President Truman, President Tappan Gregory and Former President Rix of our Association, and many other leading lawyers and jurists.

He was born in Connoquenessing Township, Butler County, on November 1, 1847. His grandfather, John Brandon, settled on a farm in that county in 1796; some of his direct descendants still occupy a part of the same farm. Mr. BRANDON attended Witherspoon Institute in Butler; in 1865 entered Jefferson College at Cannonsburg, Pennsylvania. He was graduated in 1868, the first year of the union of Washington and Jefferson Colleges. In 1937 Washington and Jefferson College conferred upon him the degree of LL.D. He is the oldest living alumnus of the college and the oldest living member of Delta Tau Delta.

Following his graduation, he taught school and studied with E. McJunkin and was admitted to the Bar on March 17, 1871. He has ever since practiced continuously in the City of Butler. Four of his chil-

dren are living; he has seven grandchildren and ten great-grandchildren. One of his sons, J. Campbell Brandon, was admitted to the firm of Brandon and Brandon in 1909 and became a member of our Association in 1924.

Mr. BRANDON has been closely identified with the oil and gas business and took part in many important cases which helped to establish many of the legal principles of the oil and gas industries throughout the country. He has been a director of and counsel for the Butler Savings and Trust Company for more than sixty years, and has been instrumental in organizing many of Butler's industries and public utilities. A lifelong Republican, he has never accepted public office.

Speakers at the dinner in his honor, which had President Judge William B. Purvis as toastmaster, were Chief Justice George W. Maxey, of the Supreme Court of Pennsylvania, and John G. Buchanan, former President of the Pennsylvania Bar Association and Chairman of our Association's Committee on the Judiciary. Their addresses were so excellent that we hope to quote from them in an early issue; lack of space forbids it at this time. An oil painting of the guest of honor was unveiled; Zeno F. Henninger made the presentation address for the Butler County Bar. "I don't want to retire," said Mr. BRANDON, "because I wouldn't enjoy it. My recipe for good health and long sleep has always been leaving all business cares behind every night when I close my office door."

James F. BYRNES

■ When former Secretary of State JAMES F. BYRNES published his *Speaking Frankly* on October 15, and it was found to contain reproductions of specimen pages of shorthand notes taken by him at Yalta and other conferences, a great deal of discussion, even controversy, arose in law offices and elsewhere as to the system which the one-time Court reporter in South Carolina had used for his speed-writing. Stenographers in present-day law offices said that they could not read the notes. The *New Yorker* on October 25 quoted a shorthand expert as saying of the Byrnes system that "it was never taught anywhere except in Charleston".

Our readers will recall that BYRNES and his cousin, the late Frank J. Hogan, a former President of our Association, started life together as office boys or clerks in a railroad office in Charleston. Mr. Hogan came to Washington during the Spanish-American War, studied law at night, practiced law awhile as a "sun-downer" and taught law at night. Then he went on to fame and fortune at the Bar. His cousin stayed on in South Carolina, got a job in a law office, began studying law, became a Court reporter at the age of 21, was admitted to the Bar, went to Congress and later to the Senate, joined our Association in 1938, was appointed to the Supreme Court, resigned to become Director of War Mobilization, and then finally became Secretary of State, in which capacity he made his momentous shorthand notes of world affairs.

Both Mr. Hogan and BYRNES learned shorthand while very young. Mr. Hogan used it all his life, in his courtroom notes, as did other outstanding lawyers of my acquaintance. The New York *Herald Tribune* has worked out the facts as to BYRNES' "system". Of course, it is not "Pittman" and it is not "Gregg" or "Harrison", nor is it something that was taught only in Charleston.

A man named Charles E. McKee, in Buffalo, New York, invented first the "McKee New Rapid System" and later the "McKee New Standard System", and wrote several text-books about it. BYRNES studied, and still uses the latter, with some "Byrnesian" adaptations. I know about the McKee system, as I tried to learn it, at about the same time, but shifted to the International Correspondence School course and system. I could not make either of them work for what I needed, in reporting usually rather serious and formidable discourses.

McKee's Shorthand Magazine, published in Buffalo, said in July of 1900, in what was probably BYRNES' first Nationwide publicity:

> Mr. James F. Byrnes, of Charleston, South Carolina, was appointed, May 21, official Court reporter of the Second Judicial District of South Carolina. Mr. Byrnes is a McKee writer of the *McKee Standard System* and a former pupil of Miss Mary T. Hughes.

Bert Price of the *Herald Tribune* has also dug up the fact that one of Charleston's daily papers made mention of BYRNES' appointment as follows:

> Mr. James F. Byrnes, a well known young man, will be appointed the official stenographer of the Second Judicial District. Judge Aldrich decided upon a competitive examination to fill the place made vacant by the recent death of Stenographer Bellinger; and, of the number examined, Mr. Byrnes made the best record and he will get the appointment notwithstanding the fact that he is not a resident of the district.
>
> This will be pleasing news to Mr. Byrnes's host of Charleston friends. Mr. Byrnes has been a stenographer and clerk in the office of attorneys Mordecai & Gadsden for a long time, where he proved his capacity and efficiency.

BYRNES has confirmed the general belief of experts that the specimens of his notes as reproduced in *Speaking Frankly* (reviewed by Professor Harold W. Briggs elsewhere in this issue) are not original notes which he made at the time of the Conferences but are transcriptions subsequently made by him from his original notes. The specimens are of course too regular and evenly spaced to have been taken "rapid fire".

Thus "mysteries" which have baffled more than a few law offices and many business establishments are clarified. W. L. R.

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE Elizabeth B. A. Rogers . . ASSISTANT

Army and Navy . . court martial held to be without jurisdiction to try officers on terminal leave.

■ *Durant* v. *Hironimus*, U. S. D. C., S., W. Va., September 4, 1947, Moore, D. J.

Mrs. Durant, by writ of *habeas corpus*, attacked her conviction by an Army court martial on the ground that it lacked jurisdiction to try her. She contended, *inter alia*, that she was an officer on terminal leave, and therefore on inactive duty, when arrested. The respondent conceded that an officer on inactive duty was not subject to a military court's jurisdiction, but maintained that an officer on terminal leave was on active duty. "Counsel," stated Moore, D. J., "have cited no cases which are decisive of the precise points involved, and I have found none." Although the Judge Advocate General had ruled that officers on terminal leave were still on active duty, Judge Moore found it clear that the rulings regarded the duty as only technically active. He found that both the Army and Navy considered such officers relieved from active duty for all practical purposes and that they were held in a technical "active duty" status only that they might be kept on the Government payroll and paid for their accumulated leave. Also indicative of such a result were (a) the fact that Mrs. Durant received her mustering-out pay before embarking upon her terminal leave, for the statute provides for its payment upon "ultimate relief from active service" [38 U.S.C. § 691b (b)], and (b) the statutory provision that such officers should not be included in calculations of the Army's strength (50 U.S.C. §303). Judge Moore concluded upon this and other grounds that the writ should be granted.

Constitutional Law . . criminal law . . state privilege against self-incrimination extends to federal prosecution . . acceptance of immunity in state proceeding prior to probability of federal incrimination is not forfeiture of right thereafter to assert therein privilege to avoid federal incrimination.

■ *People* v. *Den Uyl*, Mich. Supreme Ct., October 13, 1947, North, J. (Digested in 16 U. S. Law Week 2193, October 28, 1947.)

Having been granted immunity against self-incrimination, one Hemans proceeded to testify as a witness in a state grand jury proceeding against Den Uyl and others. He was federally indicted thereafter for leaving the state with intent to avoid testifying in that proceeding. Again produced as a witness in the adjourned state grand jury proceeding, Hemans refused to testify because it would tend to incriminate him in his pending federal prosecution. His objection was sustained and the state appealed. In the meantime, he was convicted of the federal crime, the Circuit Court affirmed, and the Supreme Court granted certiorari. Recognizing that holdings in other jurisdictions, including the federal courts, were *contra*, the Michigan Supreme Court reaffirmed its holdings that that state's constitutional privilege covered the probability of both state and federal prosecution. The reaffirmance was not only upon precedent but because "It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a state judicial proceeding which . . . may forthwith be used against him in a Federal criminal prosecution." As to the argument that, having accepted immunity, Hemans should not be allowed to assert his privilege in order to escape subsequent prosecution under federal law designed to conserve state sovereignty, the Court held that Hemans had not forfeited his privilege against self-incrimination of a federal offense by accepting immunity since the probability of federal incrimination had not arisen at the time of his acceptance. The contention that the privilege no longer existed as Hemans had already been convicted in the federal court was rejected for the reason that the Supreme Court might grant him a new trial in the certiorari proceeding.

Criminal Law . . F. R. Cr. P. . . Rule 20 invalid . . U. S. District Court lacks jurisdiction to enter plea of guilty and pronounce judgment where crime committed and indictment found in another district and state.

■ *U. S.* v. *Bink and Schwindt*, U. S. D. C., Ore., September 30, 1947, Fee, D. J. (Digested in 16 U. S. Law Week 2174, October 14, 1947.)

Schwindt, against whom an indictment had been returned in the U. S. District Court for South Dakota, was arrested in Oregon. After her arrest, she signed a document which set forth her wish to consent to disposition of the case in Oregon and plead guilty. The indictment was thereupon forwarded from South Dakota and filed in Oregon. The U. S. District Court for Oregon was then asked to receive her plea, enter a conviction, and pronounce sentence. Rule 20, F. R. Cr. P., provides that "A defendant arrested in a

district other than that in which the indictment . . . is pending against him may state in writing . . . that he wishes to plead guilty . . ., to waive trial in the district in which the indictment . . . is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. . . . [T]he clerk of the court in which the indictment . . . is pending shall transmit the papers . . . to the clerk of the court for the district where the defendant is held and the prosecution shall continue in that district . . .". The U. S. contended that Rule 20 dealt with venue only, that it had no jurisdictional implications, and that place of trial was a personal privilege which could be waived by the defendant by going to trial without objection. Fee, D. J., in an exhaustive and copiously documented decision, pointed out that, by the return of the indictment, jurisdiction was founded in South Dakota and that the court there obtained jurisdiction of the cause; that an indictment could not have been returned in Oregon and that thus the Oregon court had no jurisdiction of the cause; that the South Dakota court had not consented to loss of jurisdiction; that, if the Oregon court had obtained jurisdiction, it was by the consent of the litigants; and that jurisdiction over the subject matter could not be conferred by consent. He held that the Oregon court lacked such jurisdiction since Article III, Section 2, clause 3 and the Sixth Amendment of the Constitution of the U. S. forbade indictment, trial and judgment in a criminal case in any state and district except where the crime was committed. Throughout his opinion, Judge Fee emphasized the fact that the district courts were separate tribunals, not branches of one nation-wide district court. He expressed his belief that, by inadvertence, the committee which formulated the Criminal Rules did not investigate the jurisdictional elements of Rule 20. To the Government's argument that, by the Supreme Court's adoption of the Rule, it had determined that the transfer was a merely procedural process, Judge Fee replied: "If it can be said that the Supreme Court has already passed upon the matter and sustained the constitutionality of the Rule . . . the result would only point to the inadvisability of rendering advisory opinions."

Department of Interior . . application for land patents based on mining claims located after August 1, 1946, must set forth any connection of claimant with atomic bomb project.

■ Code of Federal Regulations, Tit. 43, Ch. I, Pt. 185, § 185.54 (12 Fed. Reg. 6831).

The Director of the Bureau of Land Management announced, in the *Federal Register* of October 18, 1947, that the general mining regulations had been amended so as to require every application for a land patent, based on a mining claim located after August 1, 1946, to state whether the claimant has had any direct or indirect part in the development of the atomic bomb project. It must state in detail the exact nature of the claimant's participation in the project and whether he acquired, from such participation, information as to the existence of deposits of fissionable source materials in the claimed land patented.

Department of State . . Federal Tort Claims Act . . procedure for handling of tort claims.

■ Code of Federal Regulations, Tit. 22, Ch. I. Pt. 10, § § 10.1-10.24 (12 Fed. Reg. 7108).

The Department of State, in the *Federal Register* of November 1, 1947, announced its procedure for handling claims under the Federal Tort Claims Act, the Small Claims Act and the Act of June 19, 1939. Three separate subparts deal with the special procedure applicable in the respective classes of claims appropriate to the three acts under which claims may be presented.

Discovery and Inspection . . F. R. Civ. P. . . court may require defendant, who appears specially to challenge service of process on ground of not doing business in jurisdiction, to answer written interrogatories under Rule 26(a).

■ *Silk* v. *Sieling*, U. S. D. C., E. Pa., Kirkpatrick, D. J., September 22, 1947. (Digested in 16 U. S. Law Week 2193, October 28, 1947.)

Defendants, who had appeared solely to challenge service of process on the ground that they did not maintain any place of business in the jurisdiction, opposed plaintiff's motion for leave to take depositions by written interrogatories under Rule 26 (a), F. R. Civ. P., pointing out that depositions could not be taken under that Rule until "after jurisdiction had been obtained". Kirkpatrick, D. J., held that, since the court had power to determine the question of its jurisdiction and to cause evidence on this issue to be produced, the court had obtained jurisdiction, although limited, over defendants when they appeared to challenge the validity of the service. He saw no reason why "jurisdiction" as used in Rule 26 (a) should be construed to mean complete jurisdiction. In answer to defendants' argument that a defendant contesting jurisdiction had been held not to be an adverse party within the meaning of Rule 33 which required an "adverse party" to answer interrogatories and that the purpose of the phrase in Rule 26 was to prevent circumvention of Rule 33, Judge Kirkpatrick said: "With all deference to the decision cited . . ., I cannot agree, but prefer to follow . . . *Savage* v. *Isthmian S. S. Co.*, 1946 A. M. C. 1330. Where a person . . . comes into court to deny the right of the plaintiff to proceed . . ., he would seem to me to be an adverse party, by any reasonably liberal interpretation of that term in its setting in the Rule."

Federal Security Agency . . Federal Tort Claims Act . . regulations governing tort claims promulgated.

■ Code of Federal Regulations, Tit.

45, Subtit. A, Pt. 35, §§ 35.1-35.7 (12 Fed. Reg. 7006).

In the *Federal Register* of October 29, 1947, the Federal Security Agency reported the cancellation of the procedure formerly established and the promulgation of new regulations for consideration of claims for damages or injuries caused by its employees.

Habeas Corpus. . F. R. Cr. P.. . . writ may be used to attack collaterally conviction on ground of insanity when convicted . . petitioner must first exhaust remedy by way of motion to vacate sentence on ground of illegality under Rule 35.

■ *Byrd* v. *Pescor,* C. C. A. 8th, October 7, 1947, Sanborn, C. J. (Digested in 16 U. S. Law Week 2184, October 21, 1947).

Byrd was indicted in the U. S. District Court for the Eastern District of Oklahoma for felonious assault. That court found him insane and committed him to a hospital from which he escaped. He was subsequently tried upon the indictment and convicted. His motion for a new trial on the ground that there had been no evidence introduced to show that he had regained his sanity was denied and he was sentenced. He thereafter petitioned the U. S. District Court for the Western District of Missouri, where he was confined, for a writ of *habeas corpus,* upon the ground that the U. S. District Court in Oklahoma had lacked jurisdiction to enter judgment against him because he was insane at the time of his trial, conviction and sentence. That court concluded that the jury's verdict was based upon a finding that he was sane at the time of the offense and that the question of sanity at the time of conviction and sentence should have been raised by appeal, rather than attacked collaterally. The Circuit Court affirmed the order dismissing the writ on another ground. It agreed with the first conclusion of the District Court but held that, because of the previous finding of insanity, Byrd was presumptively insane when convicted. Stating that Byrd's right to attack his conviction collaterally was not free from doubt, the court held, nevertheless, that such an attack was permissible where the petitioner was presumptively insane at the time of his conviction and sentence, relying upon its own decision in *Ashly* v. *Pescor,* 147 F. (2d) 318, and the Supreme Court's per curiam opinion in *Frame* v. *Hudspeth,* 309 U. S. 632. The court thought, however, that Rule 35, F. R. Cr. P., which provides that the court may correct an illegal sentence at any time, had the effect of making such a remedy an ordinary one instead of a somewhat unusual and exceptional one and, upon the ground that a defendant in a criminal case in the federal courts must exhaust all ordinary remedies before resorting to *habeas corpus,* it denied the petition.

Labor Law . . Labor-Management Relations Act . . NLRB's power to adjudicate unfair labor practice cases pending on Act's effective date unimpaired by enactment . . Board, in exercise of discretion, however, conditions bargaining order on union's filing "non-Communist" affidavits . . elimination of supervisory employees effective in pending case.

■ *In re Marshall & Bruce Co.,* Case No. 10-C-1792, NLRB, October 28, 1947.

The Trial Examiner found that the employer had refused to bargain with the union in violation of § 8 (5) of the National Labor Relations Act (NLRA). He had recommended that the employer be ordered to cease and desist from such practices and to bargain with the union upon request, this being the Board's customary order upon such a finding. The employer had filed exceptions and the case was pending before the Board when the Labor-Management Relations Act (LMRA) became effective. The Board's decision was the first dealing with an unfair practice case pending prior to the Act's effective date. It was unanimous upon the following propositions: (1) the Act did not impair its power to adjudicate unfair labor practice controversies which arose prior to its effective date or its power to issue an appropriate order in such a case; (2) the employer was guilty of violating § 8 (5) of the NLRA; and (3) despite the union's failure to comply with §§ 9 (f), (g), and (h) of the LMRA, requiring disclosure of financial and other data and the filing of "non-Communist" affidavits, the Act did not affect either the Board's power to order unconditionally the employer to bargain with the union or its power to issue its usual remedial orders for violations of §§ 8 (1), (2), (3), and (4), which sections were not involved here. The last conclusion was based upon the language used in §§ 9 (f), (g), and (h) that no complaint *shall* issue or *shall* be issued in the event of noncompliance. As to the *exercise* of its power to order unconditionally an employer to bargain in such a case, however, the Board was not unanimous. In the majority's view, an order to bargain with a union was often tantamount in practice to a certification of that union as a bargaining representative which is forbidden by the LMRA unless the union has complied with §§ 9 (f), (g), and (h). They were also convinced that those sections not only provided procedural limitations upon the Board's power to act in cases arising after the sections became effective, but that they embodied the public policy of denying use of the Board's processes to aid the bargaining position of a noncomplying union. Thus the majority believed that, in the exercise of their discretion, the order to bargain should be conditioned upon the union's compliance with the LMRA within thirty days from the order's date.

Members Houston and Murdock, dissenting, were of the opinion that the Board had no discretion to withhold the bargaining order and stated that there was no analogy between a bargaining order and a certification; that certification precedes a bargaining order and a bargaining order

does not constitute a new certification.

The Board was unanimous in directing that supervisory employees, excluded from the bargaining unit by the new Act, should be eliminated, but held that, since neither the unit nor its majority status was substantially altered thereby, the finding of a violation of the Act in failing to bargain collectively was unaffected.

(As to the latter point, see also *In re Westinghouse Electric Corp.*, Case No. 1-C-2849, NLRB, September 29, 1947, digested in 16 U.S. Law Week 2154, October 7, 1947, and see *L. A. Young Spring & Wire Corp.* v. *NLRB*, U.S. Ct. App., D.C., September 29, 1947, Miller, J.)

Same . . Labor-Management Relations Act . . intervening union's right to appear on certification ballot and participate in election conditioned on prior filing of "non-Communist" affidavits.

■ *In re The Kinsman Transit Co.*, Case No. 8-R-2660, NLRB, October 27, 1947.

The petitioning union, prior to the effective date of the Labor-Management Act, sought certification by the Board as exclusive bargaining representative of the employees. The intervening union, which had not complied with §§9(f), (g), and (h) of the Act, requiring disclosure of financial and other data and the filing of "non-Communist" affidavits, requested that its name be placed on the ballot in any election which might be directed. In a unanimous decision, the Board directed an election to be held but it made the appearance of the intervening union on the ballot and its participation in the election contingent upon its compliance with the Act before November 1, 1947.

(See also *In re Tennessee Chair Co., Inc.*, Case No. 10-R-2655, NLRB, November 4, 1947; *In re Unagusta Mfg. Co.*, Case No. 5W-R-86, NLRB, November 4, 1947; and *In re Rite-Form Corset Co., Inc.*, Case No. 6-R-1697, NLRB, November 4, 1947, in which the Board dismissed petitions for certification of representatives, which were pending on the effective date of the Labor-Management Act, because the petitioners had failed to comply with §§9(f), (g), and (h) thereof. In the *Rite-Form Corset* case, the petitioner contended, *inter alia*, that, under the Board's construction of those sections, the Act and the said sections were unconstitutional and void. The Board held that it was inappropriate for it to pass upon the constitutionality of Congressional enactments and, in the absence of a court decision to the contrary, assumed that the Act did not violate the Constitution.)

Libel and Slander . . imputation of communism may not be held nondefamatory as matter of law.

■ *Mencher* v. *Chesley*, N. Y. Ct. App., October 16, 1947, Fuld, J.

Contending that defendant in a statement to the press had falsely charged him with being a communist and having communist affiliation, plaintiff sued defendant for libel. Defendant moved to dismiss the complaint for failure to state a cause of action. Upon a determination that the statement might be construed as plaintiff urged, the Court held that it could not say that an imputation of communism was as a matter of law not libelous and denied the motion. *Spanel* v. *Pegler* (160 F. (2d) 619; 33 A.B.A.J. 375, April, 1947) was among the cases cited in support of the conclusion. It was probably the *Mencher* case that was referred to in a U. S. news broadcast to Russia resulting in a letter published in Moscow *Culture and Life* for November 1, 1947, charging that the broadcast was an insult to the Soviet people.

Maritime Commission . . rules governing admission to practice amended.

■ Code of Federal Regulations, Tit. 46, Ch. II, Subch. A, Pt. 203, §§203.1-203.11 (12 Fed. Reg. 6086).

The *Federal Register* of September 12, 1947, contains the U. S. Maritime Commission's revised regulations governing practice before that body. The regulations were promulgated by the Commission on September 3, 1947. They require that attorneys who apply for admission be admitted to practice before the federal or state courts as compared with the former requirement that they be admitted to practice before the U. S. Supreme Court or the highest court of a state.

Patents . . expiration of patent no bar to action by U. S. to cancel for fraud.

■ *U. S.* v. *Hartford-Empire Co.*, U. S. D. C., Del., October 9, 1947, Leahy, D. J.

The U. S. sought to cancel an expired patent on the ground that it was procured by fraud. Defendant moved for summary judgment, contending that the case was moot and relying upon *U. S. ex rel., Bourne* v. *Goodyear*, 76 U. S. 811 (1869), in which the Supreme Court had sustained a demurrer to a bill seeking cancellation of an extension of a patent which extension had expired before suit was filed. The Court found that the U. S. had not been a party to the *Bourne* case and that the present case was one of first impression. Proceeding on the basis that a patent is a contract between an inventor and the U. S. which like any other might be set aside for fraud and that fraud was admitted for the purposes of the motion, the Court held that cancellation of the patent *ab initio* followed. It said: "Those who have paid defendant money for royalties or damages as infringers should be in a position to demand the status quo; otherwise defendant will be unjustly enriched. . . . If the Government's case be said to be a vindication of a right in *vacuo*, under such circumstances, nevertheless I am of the view that a court must hold illegitimate even a paper semblance of a patent right where its grant is caused by the utilization . . . of fraud. At bottom, the right of the Government here is based on its obligation to protect the public . . ."

Trade-Marks and Trade Names . . Trade-Mark Act of 1946 . . applicant for cancellation of three registered trade-marks must pay three fees although application embodied in single counterclaim to an opposition proceeding.

■ *Philadelphia Quartz Co.* v. *Flower Foods, Inc.*, Opp. No. 26,386, Comr. Patents, October 17, 1947. (Digested in 16 U. S. Law Week 2192, October 28, 1947.)

Review was sought of the Examiner of Interferences' ruling requiring Flower Foods to pay three fees in connection with its application for cancellation of three trade-marks which application was instituted by way of counterclaim in a pending proceeding brought by Philadelphia Quartz Co. in opposition to the registration of a mark by Flower Foods. The trade-marks sought to be cancelled were registered in the name of Philadelphia Quartz and were relied upon by that company in the opposition proceeding. Flower Foods contended that § 31 of the Trade-Mark Act of 1946 required but one fee since there was a single application, that it would be unfair to require it to pay three fees while the opposer who relied upon three registrations was required to pay but one. The Commissioner agreed with the Examiner's ruling. He held that it was clear from the Act's entire structure that each application for cancellation was considered a separate proceeding in determining fees and that the combination in one application of requests for cancellation of several trade-marks was merely for convenience and could not, as a matter of law, be considered one petition. As to the argument based on unfairness, the Commissioner said: "[It] overlooks the fact that a showing of damage in an opposition proceeding may be made entirely independent of any existing registrations and that such registrations if actually relied upon by the opposer are but one element of showing damage . . .".

Further Proceedings in Cases Previously Reported.

■ The following action has been taken by the U. S. Supreme Court:

Certiorari Dismissed: *Fried* v. *U. S.*, Criminal Law (33 A.B.A.J. 498, 827; May, August, 1947).

Certiorari Denied: *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, International Law (33 A.B.A.J. 61, 940; January, September, 1947); *Park & Tilford Inc.* v. *Schulte*, Security Trading (33 A.B.A.J. 279; March, 1947); *Ford* v. *Magee* Bankruptcy (33 A.B.A.J. 497; May, 1947); *Swick* v. *Martin Co.*, Labor Law (33 A.B.A.J. 619; June, 1947); *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.*, Labor Law (33 A.B.A.J. 619; June, 1947); *Estin* v. *Estin*, Constitutional Law (33 A.B.A.J. 721; July, 1947); *Bereslavsky* v. *Caffey*, Federal Procedure (33 A.B.A.J. 724; July, 1947); *Levine* v. *Berman*, Veterans (33 A.B.A.J. 726; July, 1947); *Bourquin* v. *U. S.*, Judges (33 A.B.A.J. 824; August, 1947); *In re Central R. R. Co. of N. J.*, sub. nom. *Gardner* v. *State of New Jersey*, Railroad Reorganization (33 A.B.A.J. 939; September, 1947).

On October 15, 1947, the U. S. filed an amended information in the U. S. District Court for Illinois, N. D., in *U. S.* v. *Petrillo*, Labor Law (33 A.B.A.J. 157, 726; February, July, 1947). Defendant was arraigned and appeared on November 12 and entered a plea of not guilty.

Board of Editors

(Continued from page 1214)

since 1914, is a Democrat and an Episcopalian, and is the author of *The Spirit of the Legal Profession* (1938) and *The Eternal Lawyer: Cicero* (1947). His writings have been translated into several languages. He has been an active member of the JOURNAL's Advisory Board from its establishment, and was the host and chairman of the meeting of the Advisory Board in Cleveland on September 23. He has contributed many book reviews, articles and signed editorials to the JOURNAL—his latest being that in our November issue (page 1124): "The Law—Available to All—Respected by All."

Richard Bentley has served our Association efficiently in many capacities. He was born in Elmhurst, Illinois, in 1894, and was graduated from the Hill School, from Yale in 1917, and from Northwestern University in law in 1921. In World War I he was a second lieutenant in the 343rd Infantry, later captain in the 83rd Infantry, U.S.A. Admitted to the Illinois Bar in 1922, he has practiced law in Chicago ever since, and has been a member of the firm of Cassels, Potter and Bentley since 1923.

He became a member of our Association in 1925 and was Assistant Secretary of the Association from 1927 to 1936. He is a member of its Committee on the Judiciary, Vice Chairman of the Section of Legal Education and Admissions to the Bar, and member of the Committee on Low Cost Legal Service, and was wartime Chairman of the Committee on Legal Service to the Armed Forces. He is a member of the Illinois State Bar Association, has been president of the Legal Club (1934-35), and is Chairman of the Chicago Bar Association's Committee on Public Information. During 1935-39 he was a member of the Illinois Board of Bar Examiners.

During 1943-46 he was a commander, later captain, U.S.N.R., and rendered notable service as Chief of Legal Assistance in the office of the Judge Advocate General of the Navy. His home is in Lake Forest, Illinois.

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

"Drumming Up Business" for the World Court

■ When a legal dispute arises between nations which are on friendly terms, their governments usually prefer to settle it out of Court rather than to subject their amity to the strain of over-publicized proceedings before the International Court. On the other hand, disputes between nations belonging to divergent blocs reach an explosive stage so quickly that an immediate solution by a political body—the Security Council or the General Assembly—becomes necessary. No time remains for Court proceedings which might be long-drawn. The situation is not much better with respect to advisory opinions, as each organ of the United Nations is jealous of its jurisdiction and is reluctant to make its power dependent upon the Court's judgment or advisory opinion.

In consequence, the fifteen judges of the World Court and the twenty-six officials of its Registry have been faced with an empty docket for more than a year. There is a dispute pending now before the Court—the Albanian-British controversy over the mining of the Corfu Channel—but even so the prospect of just one case in two years seems appalling to the jurists of the world.

The American Bar Association has been fighting for a long time to enlarge the jurisdiction of the World Court. (For recent action on the Connally reservation to the American acceptance of that jurisdiction, see 33 A.B.A.J. 249 [March], 400 [April], 430 [May]). Similar feelings are harbored by lawyers in other countries; and the Australian Delegation to the United Nations, gave expression to it by proposing on August 19, 1947, that the General Assembly should discuss "the need for greater use by the United Nations and its organs of the International Court of Justice in connection not only with disputes of a legal character, but also with legal aspects of disputes and situations" (U. N. Doc. A/346).

When the General Assembly convened on September 16, 1947, the Australian proposal was referred to the Sixth (Legal) Committee of the Assembly, which debated it on October 8 and 9 (U. N. Docs. A/C.6/SR. 44 and 45). The able leader of the Australian Delegation, former Judge Herbert V. Evatt, proposed a resolution (U. N. Doc. A/C.6/165) recommending that

> each organ of the United Nations and each Specialized Agency should regularly review the difficult and important questions of law within the competence of the International Court of Justice which have arisen and are likely from time to time to arise in the course of its activities, particularly questions of law relating to the interpretation of the Charter of the United Nations or the Constitution of the Specialized Agency, as the case may be, and should refer to the International Court of Justice for advisory opinion questions selected as a result of such review.

He stated that the Australian proposal "was designed to facilitate the growth of a regular practice whereby the Court, as the principal judicial organ of the United Nations, should play an important role in the progressive development of international law and in matters of constitutional development." He stressed that the legal questions selected for reference to the Court would have to meet the following requirements: "(a) They should be difficult and of general importance.—(b) They should be of such a character that they were likely to arise from time to time in the course of the affairs of the organ or agency.—(c) Matters selected . . . should not relate to special and particular problems and issues which are being currently dealt with politically."

Proposed Resolution Debated by Member Nations

Sir Hartley Shawcross (United Kingdom) felt that "where there was a substantial legal point raised, legal advice should be sought from an objective forum". He pointed out that "one reason why solutions had turned out not to be solutions was because a decision has been taken on political rather than on legal considerations. When a state felt that it had a strong legal case it would disregard any political decision taken by the United Nations. It was far more difficult to disregard a decision by a judicial body."

Mr. Chaumont (France) drew attention to Article 36, paragraph 3, of the Charter, which provides that "legal disputes should as a general rule be referred by the parties to the International Court of Justice." He stated that "that was an obligation on parties and should be insisted upon. The General Assembly should make a recommendation to the Security Council to the effect that it should fullfil the terms of the Charter in that respect. The recommendation should also apply to the General Assembly itself . . . [It] should express its intention to examine whether any question presented a legal aspect and, if so, to request the Court for an advisory opinion."

The Iranian Delegation presented an additional resolution proposing that the General Assembly recommend that Member States who have not yet deposited the declarations provided for in paragraph 2 of Article 36 of the Statute of the Court should do so as soon as possible (U. N. Doc. A/C.6/164), and the de-

bate on the two resolutions was joined.

Mr. Yepes (Colombia) expressed the belief that legal and political aspects of international relations were indivisible and that the General Assembly should recommend "that Member States submit all their disputes to the Court."

Mr. Rafaat (Egypt) suggested that all Member States might be asked to provide in international agreements that all disputes should be submitted to the Court. He favored also the extension of "penal competence" of the Court and the creation of a "Criminal Division" of the Court.

Mr. Fahy (United States) emphasized that the Court "should not be just a symbol"; its use "would narrow the fields of political conflict." He exhorted "all persons participating in the legal work of delegations, organs of the Secretariat, and foreign offices" to be "conscious of the utility and availability of the Court."

Mr. Lachs (Poland) insisted that "the main reason for the present idleness of the Court was not the unwillingness of the States to submit their problems to it, but rather the particular nature of the present international situation arising from existing post-war complications. . . . The functions of a judiciary could begin only when the process of peace-making was terminated and the peace treaties had become operative law." He hoped that, in the course of time, the importance of the Court would increase, but "to force the Court to give decisions in political disputes might only weaken its prestige, and, therefore, utmost care should be exercised in that very delicate matter."

Mr. Setalvad (India) feared that the Court might be led to deal "with abstract legal aspects of various problems without having all the facts of the given case before it", and warned that the solution of urgent disputes would be delayed if they were all indiscriminately referred to the Court.

Soviet Delegate Criticizes the Proposals

A note of discordance came from the Soviet delegate, Mr. Durdenevsky, who criticized the two proposals as superfluous and contrary to the Charter. He did not believe that the unemployment of the Court was a disquieting phenomenon, but considered it as "proof that so far no situation had arisen in the international scene which would necessitate a legal process between the Member States." He warned the Committee of the danger that the World Court "might assume an analogous function to that of the United States Supreme Court whose decisions on the interpretation of the Constitution have completely cluttered up its original framework." He feared that "the tendency to interpret all political issues from a legal standpoint would result in substituting the Court for the Security Council in solving world problems." He added that "if the Court were to become a world adviser, it would have to renounce its primary function of deciding upon legal issues owing to lack of time in which to deal with such matters." (For editorial comment on some of his statements, see 33 A.B.A.J. 1123; November, 1947).

A subcommittee was then appointed, composed of the rapporteur of the Committee, Mr. Kaeckenbeeck (Belgium), the representatives of Australia and Iran and the representatives who had proposed amendments to the two resolutions—representatives of Argentina, Colombia, Egypt, France, and Poland. The drafts approved unanimously by the subcommittee were considered by the full Committee on October 22.

Court's Task Termed Assistance in Interpreting Charter

The Rapporteur explained that the proposed resolutions would not make the Court an exclusive organ of interpretation, as "other organs of the United Nations would continue interpreting the Charter, and specialized agencies would interpret their constitutions." The Court "would simply guide them in the accomplishment of their task." He added that "in order to avoid the danger of contradictions between decisions taken by an organ or agency and opinions of the Court which might subsequently be requested, it was desirable that opinions should be requested during the examination of the case and preferably at an initial stage."

A vehement attack on the proposed resolutions was made by the other Soviet representative on the Committee, Mr. Rodionov. He considered the resolution on advisory opinions as contrary to the Charter, as a device to alter the Charter by interpretative methods, and as an illegal attempt to give the Court a priority right in interpreting the Charter. The articles of the Charter on advisory opinions were permissive only, and not of an obligatory nature. A Belgian proposal to give the power to interpret the Charter was turned down at the San Francisco Conference. Any proposal to revive that idea would require an amendment to the Charter, and cannot be effected by means of a resolution. He charged that this resolution is just another instance of the attempts aimed at modifying the Charter, without explicitly saying so, under the guise of recommendations and resolutions. Any attempts to weaken the powers of the various organs of the United Nations and, in particular of the Security Council, must lead "to the undermining of the United Nations and the destruction of the democratic principles enshrined in the United Nations at its foundation and incorporated in its Charter." He added that if this resolution was—as it was claimed—merely repeating provisions of the Charter, it was obviously superfluous, but if it was going beyond the Charter, it was illegal and dangerous.

The Soviet representative disapproved also of the resolution on the acceptance of compulsory jurisdiction of the Court. He accused the authors of that resolution of "obviously striving to oust the Security Council from its leading part in the peaceful settlement of disputes . . . and . . . to transfer to the Court the leading role in such settlement of disputes." The attention of States Members was

being drawn to the desirability of acceptance of the jurisdiction of the Court by the greatest possible number of States "in order to weaken the force of a basic principle of the Statute—namely its optional jurisdiction—by sheltering behind the moral authority of a General Assembly recommendation."

Extensive Deletions Asked by Polish Representative

Mr. Rudzinski (Poland) asked for the deletion of the paragraph of the resolution that the interpretation of the Charter should be based on recognized principles of international law, the omission of the phrase at the end of the preamble with respect to the utilization of the Court "in regard to constitutional interpretation", and the cutting out of the recommendation to refer to the Court points of law relating to the interpretation of the Charter. He thought that it would be neither legal nor advisable to give such powers to the Court as a situation might arise wherein some action taken by the General Assembly could be declared by the Court as being contrary to the Charter.

Messrs. Chaumont (France), Oldham (Australia), Beckett (United Kingdom), and Abdoh (Iran) answered the criticisms of the Polish and Soviet representatives. The Rapporteur, Mr. Kaekenbeeck (Belgium) summarized the point of view of the majority. He made it clear that "it was not necessarily useless to draw attention to the advantages of some methods provided for in the Charter; nor did the fact that some things were not in the Charter necessarily imply that they were contrary to it". The rejection of the Belgian proposal at San Francisco was followed by the rejection of similar proposals giving the power to interpret the Charter to the General Assembly or the Security Council. But the rejection of these proposals "did not mean that the Assembly or the Council could not interpret the Charter". There was nothing in the Charter that would prevent the Court "from giving an advisory opinion because it related to a point of interpretation of the Charter".

The Commitee approved the resolution on advisory opinions (U. N. Doc. A/C.6/167/Rev. 1) by 39 in favor and 7 against. The resolution on compulsory jurisdiction (U. N. Doc. A/C.6/169/Rev. 1) was approved by 37 in favor, 5 against, 5 abstentions. The Committee also approved a resolution granting the right to request advisory opinions to the Trusteeship Council.

Texts of Resolutions Finally Adopted

The text of the two main resolutions follows:

I

THE GENERAL ASSEMBLY

CONSIDERING that it is a responsibility of the United Nations to encourage the progressive development of international law and

CONSIDERING that it is of paramount importance that the interpretation of the Charter of the United Nations and the Constitution of the Specialized Agencies should be based on recognized principles of international law and

CONSIDERING that the International Court of Justice is the principal judicial organ of the United Nations and

CONSIDERING that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law both in regard to legal issues between States and in regard to constitutional interpretation,

RECOMMENDS that organs of the United Nations and the Specialized Agencies should from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, including points of law relating to the interpretation of the Charter of the United Nations or the Constitutions of the Specialized Agencies, and, if duly authorized according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for advisory opinion.

II

THE GENERAL ASSEMBLY

CONSIDERING that, in virtue of Article I of the Charter, international disputes should be settled IN CONFORMITY WITH THE PRINCIPLES OF JUSTICE AND INTERNATIONAL LAW;

CONSIDERING that the International Court of Justice could settle or assist in settling such disputes if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services;

1. DRAWS THE ATTENTION of the States who have not yet accepted the COMPULSORY JURISDICTION of the Court in accordance with its Statute, Article 36, paragraphs 2 and 5, to the desirability of the greatest possible number of States accepting this jurisdiction with as few reservations as possible;

2. DRAWS THE ATTENTION of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice;

3. RECOMMENDS as a general rule that States should submit their legal disputes to the International Court of Justice.

After an acrid debate, in which Mr. Vishinsky repeated the charges delivered in the Sixth Committee by the Soviet representatives, the General Assembly approved, on November 14, 1947, the two controversial resolutions on the Court by a vote of 46 to 6 and 45 to 6, respectively. The resolution granting the right to request advisory opinions to the Trusteeship Council was approved unanimously, as the Soviet Union abandoned her opposition to it.

First Round Battle Won by Court's Supporters

The supporters of the Court have won the first round, despite the opposition of the Soviet bloc. It remains to be seen whether the exhortations will be followed by an increase in the number of new declarations accepting the jurisdiction of the Court. If the General Assembly wishes to prove that it believes whole-heartedly in what it preaches, it ought to consider seriously whether any of the legal questions which

have arisen during the current session should be referred to the Court for an advisory opinion. The International Labor Organization which, after many years of struggle, won last year the right to ask the Court directly for advisory opinions may prove its appreciation for the grant of this privilege by requesting an advisory opinion on a matter of interest to it.

Other specialized agencies should also scrutinize carefully their agenda to see whether any questions of principle have arisen in the course of their activities which an advisory opinion of the Court could settle. Once the cases start coming in and the decisions of the Court prove worthy of the confidence reposed in it, resort to the Court might become the ordinary means of settling international disputes.

LOUIS B. SOHN

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Mark H. Johnson, Committee Chairman.

Transfers Conditioned On Tax Incidence

■ Federal tax liabilities usually follow on the heels of private contract arrangements and transfers. That is the normal sequence of events. But the reverse is sometimes true. The incidence of federal taxation may give rise to private rights and liabilities among the individuals concerned, and these may in turn create new tax problems. For example the Michigan Supreme Court recently had before it the question of what to do with a family partnership that had failed of its purpose to shift the burden of the income tax. *Stone* v. *Stone*, decided October 13, 1947, Prentice-Hall, Federal Tax Service, par. 72,586. In 1942 the plainiff and his wife had transferred an undivided half interest in a manufacturing business to their two minor children as copartners. Thereafter the Commissioner of Internal Revenue determined that the partnership should not be recognized for tax purposes and taxed the entire income to the plaintiff. The plaintiff, conceding the correctness of this ruling, asked that the transfer be set aside. The Michigan court upheld the plaintiff, finding that the transfer had been made under "a mutuality of mistake . . . as to the antecedent and existing legal rights and duties of the parties in regard to the payment of income taxes". The purpose of the transfer had "failed utterly". This purpose, to minimize taxes, was "lawful", the court held, and the plaintiff did not come into equity with "unclean hands".

This may not be the end of the story. The decision should have an important bearing upon a possible claim for refund of the gift tax which the plaintiff presumably paid when the transfer was made.

A recent Tax Court case presents the unusual situation of a contract specifically conditioned upon certain tax consequences. In *Surface Combustion Corp.*, 9 T. C. No. 89, the taxpayer had set up an employees' trust (pre-1942) reserving the right to revoke and recover its contributions "in the event that the Commissioner of Internal Revenue should decide that petitioner's contribution to the fund was not deductible for federal income and excess profits tax purposes". The Commissioner argued that this very contingency rendered the contributions non-deductible since the possibility existed, upon such a determination, that they might be recovered by the employer. The Tax Court held that this contingency should be disregarded since it depended upon factors beyond the taxpayer's control. Compare the ruling of the Pension Trust Division under the 1942 amendments (PS 47, February 20, 1945) that contributions to a pension trust may not be deducted where the employer reserves the right to recover them if the trust fails to qualify under Section 165.

The classic case of this general type is *Commissioner* v. *Proctor*, 142 F. (2d) 824, in which the taxpayer set up a trust for his children providing in the instrument that the trust should be void "if it should be determined . . . that any part of the transfer in trust hereunder is subject to gift tax". The Fourth Circuit upheld the imposition of the gift tax, disregarding the contingency as against public policy. The contingency purported to nullify the transfer which was the basis of the tax liability in question and would have made moot the court's consideration of that issue.

Compensation Against Return of Capital

Money or property passing from an employer to an employee is usually treated as compensation, ordinary income fully taxable to the employee. Taxpayers have been markedly unsuccessful in recent years in their efforts to classify such payments as nontaxable gifts; *Bogardus* v. *Commissioner*, 302 U. S. 34, has been confined to its special facts. Recent decisions have likewise narrowed the area within which purchase and sale transactions between employer and employee may be had without giving rise to compensation. Thus the transfer of the employer's stock to an employee at a bargain price gives rise to taxable income even though pursuant to an option of purchase. *Commissioner* v. *Smith*, 324 U. S. 177. And by the same token ordinary in-

come, not capital gain, may be received by an employee who sells property to his employer at an inflated price.

The case of *Otto S. Schairer,* 9 T. C. No. 75, presents an exception to the general rule. The taxpayer was an employee of the Radio Corporation of America. In 1943 he was "ordered" to move his residence from Bronxville, New York, to Princeton, New Jersey, so as to be more readily available at the company's new Princeton laboratories. At the same time the company agreed to reimburse him for any loss suffered in the sale of his Bronxville house. The house was sold at a loss of $14,000 which the company paid. The Commissioner's contention that this $14,000 represented additional compensation to Schairer was overruled. The Tax Court held that this payment was "definitely a part of the sale transaction", a part of the purchase price or "amount realized" from the sale of the house. As such it constituted a non-taxable return of capital.

The court stressed the employer's intent, finding as a fact that this payment was not intended as compensation for services. Such an intent may be difficult to establish and it seems unlikely that the authority of the case will be extended beyond its peculiar facts.

Earnings and Profits—Dividends Declared But Not Paid

Whether a corporate distribution is a "dividend", taxable to the shareholders, depends upon whether the corporation has "earnings or profits" sufficient to pay it. In tax accounting the earnings and profits account of a corporation is increased, generally speaking, by each item of income and reduced by each dividend paid to its shareholders. But what is the effect of a dividend declared and set up on the corporate books as "dividends payable" but not actually or constructively paid to the shareholders?

This question was presented in the case of *Samuel Goldwyn,* 9 T. C. No. 71. The dividend was declared in 1931 and allocated to the several shareholders in a "dividends payable" account, but it was not actually paid to them until 1933. In the interval the corporation had sustained losses which reduced its earnings and profits below the amount of the dividend. The amount of earnings and profits available for dividends in subsequent years depended accordingly upon whether this account should be charged with the entire dividend as declared in 1931 or only with the portion backed by earnings and profits at the time of its payment in 1933.

A majority of the Tax Court held that the mere declaration of the dividend in 1931, creating a debtor-creditor relationship between the corporation and its shareholders, was sufficient to reduce earnings and profits, even though the shareholders might not be taxable until the dividend was paid to them, either actually or constructively, in a later year. The effect of a dividend on corporate earnings and its taxability to the shareholders are two distinct questions, the court holds; and a negative answer to the second does not determine the first.

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Letters to the Editors

Editors of the University of Chicago Law Review Reply to Judge McColloch

To the Editors:

The October issue of the JOURNAL contains (page 1045) a letter from Judge Claude McColloch, addressed to the Editor of the *University of Chicago Law Review,* protesting against what he called the "intemperate attacks" on the Supreme Court in two articles in the April issue of the *Review.* We are sorry for the delay in replying to his letter, but, as the JOURNAL surmised, the delay was a result of the arrival of the letter on the last day of the summer term. An invitation to answer the articles in our April issue was sent to Judge McColloch soon after school reopened.

Whether Professor Watt's forty-five page analysis of the *Lewis* case contained intemperate phrases is a matter of opinion. The *Review,* however, does not wish to influence the style or qualify the opinions of its contributors. Numerous examples could be cited of "intemperate" concepts and ideas first suggested in the legal periodicals which have become accepted parts of modern law. We believe that the articles in our April issue were well within the bounds of legal criticism and that each made a contribution toward understanding the problems raised by the Supreme Court's decision in the *Lewis* case and by the pending national labor legislation. Moreover, it should be noted that the April issue contained articles by Cyrus Eaton, Lloyd K. Garrison, Raleigh W. Stone, and Paul Douglas in addition to those by Professors Gregory and Watt, Senator Morse, and Lee Pressman. Thus many viewpoints were represented. Senator Taft and Virgil Jordan, President of the National Industrial Conference Board, were also among those invited to contribute to the April issue, but they expressed regret that the pressure of their work did not allow them time to do so.

In accordance with our policy of promoting the vigorous presentation of significant legal questions, we are publishing in the autumn issue of the *Review* a number of articles dealing with the Illinois Constitution and the Illinois Supreme Court. If Judge McColloch's protest is directed to our conception of the proper function of a law review, then our autumn issue should raise the problem more directly. We are interested in know-

in whether JOURNAL readers think these articles are outside the bounds of legal criticism, and will undertake to publish as many comments from them as space permits on the role of law reviews and legal criticism in the development of the law.

CHARLES D. STEIN
BERNARD WEISSBOURD
Editors-in-Chief of
The University of Chicago Law Review

Chicago

Consistency in Criticism of the Supreme Court of the U.S.?

To the Editors:

In the JOURNAL for October (page 1045) Judge Claude McColloch has a letter remonstrating against criticism of the Supreme Court of the United States. Yet on page 1052 of the same issue, Judge McColloch calls a decision of this same Court a "mass rape". It seems to me like he is not consistent.

Personally, I think it is good for all Courts to be criticized freely at all times by anybody.

PHIL STONE

Oxford, Mississippi

More About "the Case System" in Law Teaching and the Decision of Cases

To the Editors:

Ben W. Palmer writing about Natural Law in the JOURNAL (32 A.B.A.J. 328; June, 1946) under "Defense Against Leviathan", makes a point that I believe could be added to Francis P. Whitehair's "Specific Program of Suggestions Offered for Consideration" (33 A.B.A.J. 751; August, 1947 issue). To quote Mr. Palmer (page 331):

> Social sciences suffered also from a blind copying of the methods of the physical sciences in that they tended to exclude consideration of what ought to be from their studies and concentrated too much on what is. This resulted in an exclusion of the ethical elements in social studies and in the field of law and reduced everything to mere description. By subtle psychological process it also tended to an acceptance of the conclusion, stimulated by belief in evolutionary progress, that whatever is is right. Here too was fertile soil for philosophies justifying any existent force in the field of law and political life even though totalitarian.

And Mr. Palmer again at page 332:

> *The case system of teaching law.* Begun at Harvard in 1870, the year Mr. Justice Cardozo was born and Mr. Justice Holmes entered that school as teacher, it dominates American legal education. No one of any intelligence would deny the generally beneficial effect of the case system upon American law and upon the competency of the Bar. But, like other beneficial developments referred to, its results are now seen to be in some respects harmful. Certainly the case system suffered from that over emphasis on analysis and of the "is" at the expense of the "ought" and the lack of synthesis and over specialization that affected the inductive science to which it was akin. It tended to be merely descriptive. It neglected the deeper problems of the law. It ignored philosophy. Dominated by Austinian concepts it isolated law from the social sciences and from morals. It gave lawyers a false conception of the law as a whole by concentrating their attention on litigated cases as the only law in action while disregarding the atmospheric pressure of law on the non-litigious and the general trends of the law. It tended to make lawyers too exclusively client-caretakers at the expense of their opportunity and duty as leaders of society. Too many American lawyers, therefore, untrained in philosophy, drifted into pragmaticism and joined the worship of efficiency. Infused with the idea of Progress, they accepted belief, as Pound says, that "whatever is done in the course of judicial decision is law because it is done, not done because it is law". And those who hoped that a sound philosophy of law would result from the mere accumulation of legal "facts" were doomed to disappointment. Moreover, the efficiently developed system of reporting every case and the amazingly ingenious system devised to help the practicioner find an "all fours" case in some respect only contributed to a lack of synthesis and of search for guiding principles.

We have now come full circle in "mere description" by the undertaking known as *Restatement of the Law.*

Broad minded men, great humanitarians, were mindful of the fallacy of the "case" system long before Harvard fell into error by adopting it. Lincoln had something to say about it in his First Inaugural Address, from which I quote the part appearing in the JOURNAL (33 A.B.A.J. 301, April issue):

> I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decisions may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between the parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of the eminent tribunal. Nor is there in this view any assault upon the courts or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

A case decided more nearly according to natural law and the legal maxims, without being dominated by the "case" system, would result in satisfied clients in the lower Courts. As it is now under domination by the "case" system, there seems to be a duty on the part of attorneys for unsuccessful litigants to inform their client of the cases holding to the contrary of the verdict, which can nearly always be found, and then the client "can take his chances" in the higher Court if he so desires. Too many of them do, on cases that only should affect the parties, but result in another printed report to be screened by future litigants.

STANLEY L. BURNS

Proctor, Vermont

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Practising lawyer's guide to the current LAW MAGAZINES

BANKRUPTCY—*"Sick Sixty: A Proposed Revision of Section 60A of the Bankruptcy Act":* The logical implications of the literal interpretation given to the *"bona fide* purchaser test" under Section 60A of the Bankruptcy Act, by the Supreme Court in the *Klauder* case, 318 U.S. 434, led Professor Arthur J. Keefe, of the Cornell Law School, John J. Kelly, Jr., and Myron S. Lewis, the present and previous Editor-in-Chief of the *Cornell Law Quarterly,* to contribute to its November issue (Vol. XXXIII—No. 1; pages 99-113) a proposal for revision of Section 60A. The present bill drafted and supported by our Association for the purpose is criticized as having defects and omissions. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

CIVIL RIGHTS—*"Exclusion, Ejection, and Segregation of Theater Patrons":* That the business of operating a theater is a private enterprise and that the proprietor, in the absence of statutory restrictions, is accordingly free to make reasonable regulations for the conducting of his enterprise, has been recognized by the majority of Courts. In the May issue of the *Iowa Law Review* (Vol. 32—No. 4; pages 625-658), Max W. Turner and Frank R. Kennedy discuss the common-law concept of the right of exclusion, the revocable-license theory and the seating of patrons, and, the present-day trend toward restricting the operator's freedom of choice in these matters. They conclude that the English doctrine of the revocable license, which in earlier cases had been followed by the United States Supreme Court, is now being rejected by many American Courts in favor of the right to recover damages, either in actions in tort for wrongful ejection or in actions for breach of contract. Of the restrictions on the right of exclusion and segregation, the authors regard those found in the civil rights statutes as the most significant. (Address: Iowa Law Review, College of Law, Iowa City, Iowa; price for a single copy: $1.00).

COMPARATIVE LAW—*"Impact of the Occupation on German Law":* In the November number of *The Record,* published by the Association of the Bar of the City of New York (Vol. 2, No. 8; pages 315-324), Paul L. Weiden, of the New York and District of Columbia Bars, contributes an informative article under the above-quoted title. Mr. Weiden has been a member of our Association since 1939, and recently wrote for the JOURNAL an article on "Administrative Action: More About the 'List of Blocked Nationals'" (33 A.B.A.J. 574; June, 1947). (Address: The Record, 42 West 44th Street, New York 18, N. Y.; price for a single copy not stated).

CONSTITUTIONAL LAW—*Taft-Hartley Act—"Reasons in Retrospect":* The leading article in the September issue of the *Cornell Law Quarterly* (Vol. XXXIII—No. 1; pages 1-39) is an outstanding study of the Taft-Hartley Labor-Management Relations Act from the point of view of possible questions as to its constitutionality. The author, Professor Arthur E. Sutherland, Jr., of the Cornell Law School, says that there are parts of the Act which might be held to be vulnerable on the ground that they interfere with civil liberties. He is of the opinion, however, that at least the greater part of the new legislation is beyond constitutional attack if the Court will follow the reasoning it employed in upholding the validity of the Wagner Act. Indeed, the article in effect urges that the present Court apply to this Act the reasoning of the liberal-minded jurists who in the 1930's contended and held that the Courts should not constitute themselves as stumbling blocks to considered social legislation such as the Wagner Act and the 1947 amendatory and supplementary Act. The discussion closes with a plea that both sides of the labor-management controversy avoid name-calling and litigiousness and devote their principal attention to an effort to make the new Act operate well and fairly. The article is one which should be read and pondered by lawyers who have problems in this field. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

CONSTITUTIONAL LAW—*"The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws":* The leading article in the June issue of the *University of Chicago Law Review* (Volume 14—No. 4; pages 539-566) is a provocative re-analysis of the limited

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

constitutional doctrine concerning *ex post facto* legislation, by Professor William Winslow Crosskey, of the University of Chicago Law School. As the title of his article implies, his purpose was to re-appraise the content of the *ex post facto* clause of the Constitution in the light of contemporary opinion. He maintains that at the time the Constitution was adopted, the prevailing sentiment was that the prohibition against *ex post facto* legislation was related primarily to retrospective civil legislation rather than merely to criminal legislation. He traces also the development of the doctrine of *Calder* v. *Bull,* the majority opinion which he finds has been based upon an erroneous array of authorities. This article is described as a chapter in a forthcoming book by Professor Crosskey, *Politics and the Constitution: A Story of Distortion, Misconception and Misconstruction in our Fundamental Law.* (Address: The University of Chicago Law Review, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: $1.00).

CORPORATIONS—*"Accountants and the Law":* The intermingling of accounting problems with questions of law, particularly under the regulatory activities of the Securities and Exchange Commission, has provoked a number of articles on the proper relationship between legal rules and accounting conventions and on the respective provinces of the lawyer and the accountant. There is no doubt that the business lawyer needs to know to an increasing extent the limits, not only of his own functioning under regulatory statutes, but also the extent to which reliance may be placed upon the work of public accountants. A considered article, entitled as above quoted, is in the November issue of the *University of Pennsylvania Law Review* (Vol. 96—No. 1; pages 48-65). The author is Ralph Wienshienk, a recent graduate of the Yale University Law School, where he is conducting a course in law and accounting. (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia 4, Pa.; price for a single copy: $1.00).

COURTS—*"The 1946 Term of the Supreme Court" of the United States:* Four well-annotated articles which review the work of the Supreme Court during its October 1946 term comprise the substantial part of the September issue of the *Columbia Law Review* (Vol. 47, No. 6; pages 883-1008). Fowler Harper, a visiting professor at the Yale University School of Law, considers the Court's decisions in the field of conflict of laws (pages 883-913). His analysis of *Koster* v. *Lumbermens Mutual Casualty Co.,* 67 S. Ct. 828, will be helpful to lawyers who may be uncertain as to the extent of recent limitations upon the doctrine of *forum non conveniens.* Sergei S. Zlinkoff, a former editor of the *Columbia Law Review,* and Robert C. Barnard, Special Assistant to the Attorney General of the United States, have collaborated in an article reviewing the cases concerned with trade regulation (pages 914-952). These cases involved the validity of estoppel clauses in patent licenses, patent assignments and the enforceability of conditions, the scope of the antitrust laws and the nature of the relief granted where a violation has been found, and trade-mark protection and second-hand businesses. The authors suggest that the Court may not have fully exercised its powers to restore and preserve competition in these recent determinations. Osmond K. Fraenkel, of the New York Bar, contributes a study of the Court's decisions in the category of civil liberties, which considers the federal and State criminal cases before the Court during the term and cases dealing with religion, restrictions upon government employees and contempt of court (pages 953-978). Mr. Fraenkel expresses the opinion that the Court's rulings indicate a trend away from the upholding of the rights of the individual. The concluding article by Leonard B. Boudin, of counsel for the CIO and other labor unions, who has written several articles dealing with the rights of labor, examines the recent decisions in the field of labor law, including cases arising under the Wagner Act, the Fair Labor Standards Act, the Railway Labor Act and the Selective Training and Service Act (pages 979-1008). By no means all lawyers will agree with Mr. Boudin's statement, or his reasons for saying, that the Supreme Court "grossly misinterpreted" two statutes in the well-publicized *United Mine Workers* case, nor will they subscribe to his pessimistic views as to the legal rights of labor in the future. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents).

FEDERAL PRACTICE AND PROCEDURE—*"The Inconvenient Federal Forum":* An excellent exposition of the growth and development of the doctrine of *forum non conveniens* is in the July issue of the *Harvard Law Review* (Vol. LX, No. 6; pages 908-939). Professor Robert Braucher, Visiting Professor of Law at the Harvard Law School, traces the history of the doctrine from its putative origin in the Scottish Courts through to the recent decisions of the Supreme Court of the United States in *Gulf Oil Corp.* v. *Gilbert* (67 S. Ct. 839) and *Koster* v. *Lumbermens Mutual Cas. Co.* (67 S. Ct. 828), carefully emphasizing the distinction between non-discretionary dismissals of actions on principles of jurisdiction, venue, and service of process, and discretionary dismissals of actions based on considerations of convenience, efficiency and justice. Professor Braucher concludes his article with interesting and constructive comments and criticisms relative to the pending proposal for review of the Judicial Code (H. R.

7124) which presumably will, if adopted, broaden the doctrine of *forum non conveniens* in respect of matters of trial convenience. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.10.)

FEDERAL TAXATION—*"Loss Carry-overs Under the Internal Revenue Law":* A comprehensive and highly useful article under the above-quoted title is contributed to the September number of the *Cornell Law Quarterly* (Vol. XXXIII—No. 1; pages 50-72), by J. L. Lasser, a certified public accountant of substantial experience. A lawyer with problems in this field will do well to obtain and study this analysis, which demonstrates *inter alia* that business men (and lawyers) "better understand the technical mechanics of the carry-over". (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

LEGAL PROFESSION—*Unauthorized Practice of Law—"A Plague on Both Their Houses: The Accountant-Lawyer Differences Over Tax Practice":* The September number of the *Journal of Accountancy* contains a lively, controversial article by Louis S. Goldberg, of the Iowa Bar (Sioux City), who says he has practiced both accountancy and law since 1928 and has been a member of the American Institute of Accountants since 1932. He has been a member of our Association since 1935. He quotes and criticizes what he evidently regards as "unseemly squabbling" between the organized lawyers and the accountants. (Address: Journal of Accountancy, 13 East 41st Street, New York 17, N. Y.; price for a single copy: 50 cents).

MONOPOLY—*"The New Sherman Act: A Positive Instrument of Progress":* Professor Eugene V. Rostow of the Yale University Law School contributed to the June issue of the *University of Chicago Law Review* (Vol. 14—No. 4; pages 567-600) an analysis, under the above-quoted title, of recent trends in the enforcement of the Sherman Act, which he believes have brought out the possibilities of that Act as a restraining statute more realistically in line with current dangers of monopoly. Professor Rostow considers that the primary evil of monopolies is in their control of the market rather than in the profit-making activities of particular individuals. He cites the decision of the U.S. Circuit Court of Appeals for the Second Circuit in *U.S.* v. *Aluminum Co.*, 148 F. (2d) 416, and the decision of the Supreme Court in *American Tobacco Co.* v. *U.S.*, 328 U. S. 781, as implementing the modern conception of monopoly regulations. (Address: The University of Chicago Law Review, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: $1.00).

TAXATION—*Domestic Relations—Community Property Problems in Pennsylvania:* The community property statute recently enacted in Pennsylvania to make the tax advantages of the traditional community property States available to residents of Pennsylvania necessarily does more than create a basis for dividing income for tax purposes between husband and wife. The extent to which the statute raises new questions in property and estate law is considered in two articles in the November issue of the *University of Pennsylvania Law Review* (Vol. 96—No. 1; pages 1-19 and 20-47). Judge Herbert F. Goodrich, of the U.S. Circuit Court of Appeals, and William T. Coleman, Jr., of the Philadelphia Bar, are the authors of the leading article on "Pennsylvania Marital Communities and Common Law Neighbors", which deals primarily with questions of conflict of laws which the new statute may create. Judge Goodrich, a recognized authority in this field, relates the situations created by the new Pennsylvania statute to decisions in other community property States where conflict of laws problems have been met. The second article, "Observations on Some Pennsylvania Community Property Problems", is the first installment of a comprehensive survey of the Pennsylvania statute and its application to various transactions which may be expected to arise. The authors are Cuthbert H. Latta and Kenneth W. Gemmill, of the Philadelphia Bar. This article may well serve as an initial guide to practice under such a statute, and will be of much interest to lawyers in other States which are considering community property legislation. (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia 4, Pa.; price for a single copy: $1.00).

TAXATION—*Federal Income, Estate and Gift Taxes—"Significant Developments in the Law of Federal Taxation, 1941-1947."* In the April and May issues of the *Michigan Law Review* (Vol. 45—Nos. 6 and 7; pages 659-678, 813-864), Paul G. Kauper, Professor of Law at the University of Michigan, reviews briefly each of the more significant legal developments in the field of federal taxes during the war period. Originally prepared as one of a series designed to acquaint returning veterans with legal developments while they were away at war, this article helpfully catalogues the more significant changes in the tax field, whether legislative, judicial or administrative. The period chosen witnessed tremendous changes in this area, running the gamut from the Revenue Act of 1942 and the Current Tax Payment Act of 1943 on the legislative side to the *Dobson* decision on the judicial side. In addition to his item-by-item resumé of changes, the author also provides a critical survey of the general trends and accomplishments attributable to the period in question. (Address: Michigan Law Review, Ann Arbor, Mich.; price for a single copy: $1.00).

OUR YOUNGER LAWYERS

Eugene C. Gerhart, Editor-in-Charge
T. Julian Skinner, Jr., Chairman, Jasper, Alabama
Walter B. Keaton, Vice Chairman, Rushville, Indiana
Charles H. Burton, Secretary, Washington, D. C.

■ The Activities Committee headed by C. Keating Bowie, Jr., of Baltimore, has completed an analysis and survey of the whole program of the Junior Bar Conference, based upon answers to questionnaires which were sent to all members of the Conference. Nineteen activities were listed for an expression of preference relative to priority of interest; questions were included to elicit impressions as to the effectiveness of certain of these programs in the member's State and locality. The summary below gives the results of this survey.

PIP Gets Top Billing in the Activities Survey

The greatest interest was shown in the Public Information Program. First place was given to this activity by more than one out of every five members of the Conference. Nearly half of them selected it as one of the first five in interest, among the nineteen projects listed. This rating speaks well for the fine work of last year's PIP National Director, W. Carloss Morris, Jr., of Houston, Texas, who is serving this year in the same capacity. It also proves again the theory of former PIP National Director, Thomas F. Healy, Washington, D. C., who, with his typical Irish wit, once remarked:

> Lawyers like to stay away from a radio "mike" like bees like to stay away from honey.

The survey shows, however, that there is much work to be done even in this field. Of those answering, 58 per cent stated that no effective Public Information Program was functioning in their locality; of these, 90 per cent thought that a Public Information Program should be organized in their community. Accordingly, the Conference has placed its Public Information Program at the top of its activities for this Association year.

CHARLES H. BURTON

Some 76 per cent of those answering said that the radio scripts supplied by the Junior Bar Conference were in all respects satisfactory. Information as to the scripts available, including a series on the United Nations, may be obtained from PIP Na-

Summary of Junior Bar Conference Placement and Survey of Relative Interest in Activities - 1947

The following summary shows the ranking of various activities of the Conference, listed in the order of the members' interest choice:

	(1) First	(2) In First Five	(3) In First Ten	(4) All
Public Information Program	21%	47%	52%	64%
Unauthorized Practice	11%	35%	41%	51%
Small Litigant	7%	25%	33%	44%
Legal Aid	7%	22%	30%	40%
Justice of the Peace Courts	7%	19%	26%	40%
The Young Lawyer	6%	21%	30%	40%
Veterans' Assistance	6%	25%	30%	40%
Uniform Laws	6%	21%	31%	41%
Relations with Law Students	4%	22%	30%	43%
Membership	4%	16%	23%	39%
Administration of Criminal Justice	3%	13%	20%	31%
Procedural Reforms Studies	3%	19%	23%	33%
Traffic Courts	3%	13%	21%	35%
Personal Finance	3%	12%	19%	29%
Legislative Drafting	2%	16%	23%	34%
Public Defender	2%	10%	19%	29%
Inter-American Bar	2%	4%	10%	25%
Restatement of Law	1%	10%	19%	29%
Rights of Mentally Ill	1%	8%	15%	29%

(1) This column shows the percentage listing the activities as first choice.
(2) This column shows the percentage listing the activities including the first to the fifth in interest.
(3) This column shows the percentage listing the activities including the first to the tenth in interest.
(4) This column shows the percentage listing any interest whatsoever in the activity.

tional Director, W. Carloss Morris, Jr., 1302 Rusk Avenue, Houston, Texas, or from your State Public Information Program Director.

Measures Against Unauthorized Practice Placed Second

The efforts of the Bar to stamp out unauthorized practice of law took second place, among the younger lawyers. Such interest is not surprising in view of the close relationship between unauthorized practice and the financial well-being of younger lawyers. This project is comparatively new for the Junior Bar Conference; its inception was at the 1946 Annual Meeting.

The Conference program has been coordinated with the work of our Association's Committee on Unauthorized Practice of the Law, which is under the chairmanship of John D. Randall, of Cedar Rapids, Iowa. Robert W. Detweiler, of Philadelphia, formerly Conference Council Member from the Third Circuit, has been acting as liaison representative with the Association's Committee. Through his efforts, a Conference member in each of thirty-six States has been assigned to work on an Advisory Committee to the Association's Committee. Appointments for the remaining States will be made soon. The Conference Committee will work with the similar Advisory Committee of the senior Bar. All Conference members interested in assisting in this worthwhile activity should communicate with Robert A. Detweiler, Lewis Tower Building, Philadelphia, Pennsylvania.

Small Litigant Problems Share Spotlight

Evidence of the public-minded spirit of younger lawyers is the "show" place given to the problems confronted by that great group of people generically classed as "small litigants." Of the answers received, 71 per cent said that surveys of small loan practices should be made in their own States, and 94 per cent felt that such surveys should be made in States other than their own. Legal aid work and reforms in the justice of the peace Court systems, which have been a part of the work of the Conference Committee to Aid the Small Litigant, also commanded a high priority in the thinking of Conference members.

Law Student Relations Hold Interest

Fourth spot in the over-all interest of the younger lawyers goes to the activities relating to law students. Excellent results in this field have been accomplished during the past two years under Father Joseph T. Tinnelly, of St. John's University Law School, Brooklyn, New York. This year the committee's new chairman, Victor S. Axelroad, of New York City, will continue these projects and also endeavor to put into practice in the law schools throughout the country some of the steps recommended by Dean Robert G. Storey, of Texas, at the annual meeting of the Junior Bar Conference in Cleveland. (See "Our Younger Lawyers," 33 A.B.A.J. 1157; November, 1947).

Junior Bar Conference Publication Well Received

The Young Lawyer, the Conference's bi-monthly publication, stood fifth in the projects claiming first position in over-all interest of Conference members. An overwhelming majority of 78 per cent responded that they found *The Young Lawyer to* be interesting reading; only seven per cent said that they had submitted news items to the editor. Charles H. Burton, of Washington, D. C., has retired as editor and is one of the four members of the Conference who are on the Advisory Board of the JOURNAL. In order that the interest in the Conference publication may be maintained, newsworthy items about local Bar Association activities should be sent to the new editor, Ulrich Schweitzer, at 31 Nassau Street, New York 5, New York.

International Law Commission is Created

■ By one of those unpredictable but highly gratifying developments which take place in legislative bodies, the General Assembly of the United Nations decided at Lake Success to go ahead with the creation of an International Law Commission for the progressive development and eventual codification of international law. This action was voted on November 21, which was virtually the last day of the full-scale session of the second regular meeting of the Assembly, and was taken without a dissenting vote, although the Soviet Union and the Slav states abstained.

The decisive factor in overcoming the apparent reluctance of several of the larger states was the insistence of the smaller nations, which are intent on establishing the rule of law for their own protection and for the peace of the world. The point of view stated in our November issue ("Set-back for International Law", page 1121) was emphatically urged; it finally prevailed.

The Resolution as adopted followed the general outlines of the plan recommended by the General Assembly's Committee (33 A.B.A.J. 621; June, 1947), but there were some modifications. Members of the Commission will be nominated early in 1948 but will not be elected until a year hence, but the Secretariat will continue actively its preparatory ground-work. Under an amendment offered by the United States, the ILC, when created, can prepare conventions for "adoption" by the Assembly. These will require ratification by the member states, as the Assembly can only "recommend."

Bar Association News

Richard B. Allen • Editor-in-Charge

Colorado Bar Approves Plan to Change Judicial System

■ Colorado lawyers by a three-to-one vote approved a plan for non-partisan selection of judges and other important changes in the State's judicial system, at the 49th annual meeting of the Colorado Bar Association at Colorado Springs on October 16 to 18.

The plan backed by the State Association is the result of two years' work by an industrious committee headed by Philip S. Van Cise, of Denver, as Chairman, and Stanley Johnson, also of Denver, as Executive Secretary. Primarily it is the "Missouri Plan" for the selection of all judges on a non-partisan basis, excepting judges of County Courts in the most thinly-populated areas; but it includes also the following sweeping changes in the State's judiciary: (1) A salary schedule is set up for judges, ranging from $550 for part-time lay judges in rural areas to $9000 for justices of the Supreme Court; (2) The retirement and removal of judges is provided for; (3) The Chief Justice of the Supreme Court is made truly the administrative head of the judicial system, by the creation of a Judicial Council and an Administrative Office for the State Courts; (4) The jurisdiction of Courts is defined, trials *de novo* are eliminated, and the Court system is integrated; (5) The office of justices of the peace is eliminated and their functions are assigned to magistrates under supervision of the County Courts; and (6) A referee system is set up which would be utilized to accept pleas of guilty, small fines, and pleadings to be sent to magistrates.

After approval of the proposal by the Assembly of the State Association, the Board of Governors instructed the committee to put the plan in final form for a special election to be held in February of 1948, leading to the submission of a constitutional amendment to the electorate in November.

THOMAS M. BURGESS

Other actions taken by the Association were:

(1) Disapproval of the McCarran Resolution (S. J. Res. 145) in the U. S. Senate and the Hinshaw bill (H. R. 1848) in the House of Representatives, on the ground that both would be detrimental to the development of irrigation and power projects in the West and creative of litigation.

(2) Request for amendment of the Flood Control Act of 1944 so as to make non-navigable waters created by projects of the Army Corps of Engineers subject to the irrigation laws of the State where the project is situated in the same manner as are reclamation projects.

(3) Steps to revise and bring down to date the compiled statutes of the State, and to revise legal forms.

(4) Creation of new committees to deal with relations between attorneys and other groups.

(5) Recommendation for the study of statutes dealing with probation and parole, criminal law and criminal procedure, and the creation and expansion of committees dealing with these subjects.

As principal speaker for the meeting, Senior Circuit Judge John J. Parker, of North Carolina and the Fourth Circuit, declared that the Nuremberg war crimes trials represented a triumph for international law, justice and cooperation. At another session, Will Shafroth, Chief of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts, sketched developments in judicial administration.

Thomas M. Burgess, of Colorado Springs, took office as the new President of the Association. William Hedges Robinson, Jr., of Denver, was named as President-Elect; Vernon Ketring, of Denver, Treasurer; Jean Breitenstein, of Denver, Senior Vice President; and George Wilkes, of Florence, Frederick M. Emigh, of Durango, and Frank Dolan, of Boulder, Vice Presidents.

Delaware State Bar Association Receives Award of Merit

■ With no formal program planned, the Delaware State Bar Association held its annual meeting at noon on October 27, in the Hotel DuPont, in Wilmington. The President accepted formally the Award of Merit to the Association by the American Bar Association at its 1947 Annual Meeting in Cleveland. (See 33 A.B.A.J. 1160; November, 1947). Among the routine actions taken was the appointment of a committee to investigate and report opportunities afforded to members for further legal studies through the Practicing Law Institute. The Association also reviewed various plans for group insurance for members.

John J. Morris, Jr., of Wilmington, was re-elected President. Other officers re-elected are Frank M. Jones, of Georgetown, First Vice President; Howard E. Lynch, of Dover, Second

JOHN J. MORRIS, JR.

Vice President; George C. Hering, Jr., of Wilmington, Third Vice President; Howard Duane, of Wilmington, Treasurer; and Albert L. Plummer, of Wilmington, Secretary.

Rhode Island Bar Approves Life Tenure for Judges

■ Approval of a plan for life tenure for judges of the State's two highest Courts—the Superior Court and the Supreme Court—was voted again by the Rhode Island Bar Association at its annual meeting at Providence on October 29.

Associate Justice William O. Douglas of the Supreme Court of the United States gave the principal address on "The Bill of Rights and Civil Liberties". Retiring President Harold B. Tanner, of Providence, reviewed the work of the Committee on Amendment of the Law, which was active and successful, during the 1947 session of the State legislature, in obtaining the passage of various bills approved by the Association as to substantive law and procedure. He complimented the Membership Committee for its year of excellent work, and stated that the Association's membership now includes three-fourths of the practising lawyers in the State.

Fred A. Otis, of Providence, was elected President; James L. Taft, of Cranston, First Vice President; Andrew P. Quinn, of Providence, Second Vice President; James H. Higgins, Jr., of North Smithfield, Secretary; and Hayward T. Parsons, of Providence, Treasurer. The Executive Committee consists of Arthur J. Levy, Chairman, Frank C. Cambio, Valmore M. Carignan, William M. Mackenzie, and Arthur J. Sullivan.

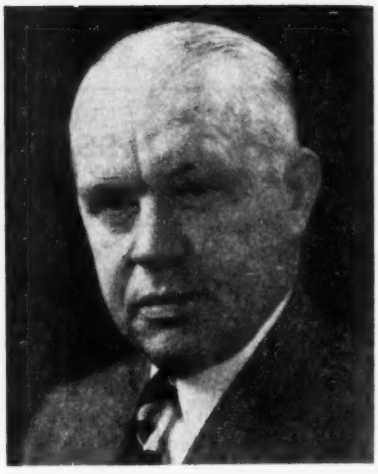
Incoming President Otis was born in Pawtucket, Rhode Island, on April 4, 1881, received his Ph.B. degree from Brown University in 1903, his LL.B. from Harvard Law School in 1906, and was admitted to the Rhode Island Bar in 1907. He was Assistant Attorney General of Rhode Island in 1916-1921 and 1939-1941 and United States Commissioner for the District of Rhode Island in 1929-1939. He is President of the Legal Aid Society of Rhode Island and a member of the American Bar Association's Special Committee on Improving the Administration of Justice.

Vermont Bar Association Has Its Largest Attendance

■ The 70th annual meeting of the Vermont Bar Association was held in Montpelier on October 7 and 8, with the largest attendance in its history. Reports of various committees, showing much study and recommending improvements in the law and procedure, were received and acted upon with marked interest.

Harold C. Sylvester, of St. Albans, the retiring President, gave the annual address, on the lawyer's duty in regard to what he considers to be evil tendencies in centralized government. Charles A. Plumley, the Member of Congress from Vermont, spoke on the record of the first session of the 80th Congress. A memorial address as to the late Edward H. Devitt was delivered by Fred E. Gleason and one as to the late Robert E. Healy, member of the SEC, was given by Norton Barber.

FRED A. OTIS



HAROLD I. O'BRIEN

During its business sessions, the Vermont Association considered the matter of returning to term practice in County Courts—a subject which aroused active discussion and on which sentiment of the members present was evenly divided. Unauthorized practice of law by banks and others was considered, and steps were authorized to improve existing conditions. The Legal Aid Committee was instructed to take charge of the Association's work in aiding men and women in the Armed Forces who require legal counsel and assistance.

Harold I. O'Brien, of Rutland, was elected President of the Association. Other new officers are: Osmer C. Fitts, of Brattleboro, Vice President; Norton Barber, of Bennington, Second Vice President; William H. Edmunds, of Burlington, Third Vice President; and Webster E. Miller, of Montpelier, Treasurer. Clifton C. Parker, of Morrisville, State Attorney General, was elected a member of the Board of Managers. H. J. Conant was re-elected as Secretary.

The 1947 Assembly:

Summary of Proceedings in Cleveland

■ Five well-attended sessions of the Assembly were participated in by members of our Association present in Cleveland, reflecting the large attendance and spirited interest. Eleven Delegates from the Assembly to the House of Delegates were nominated from the floor and elected by printed ballots, ten of them to fill new posts. Amendments of the Constitution and By-Laws of the Association were adopted by the Assembly and thereby put into effect, the same having been approved by the House. Resolutions offered on the floor of the Assembly or otherwise filed were reported and acted on, following public hearings by the Resolutions Committee under the Chairmanship of Roy A. Bronson, of California. A lively debate took place on a resolution as to the States' title to lands under the tidal waters, etc. A notable forum was conducted as to the role of the judiciary and the legislature in present-day representative government. Tappan Gregory, of Illinois, was inducted as President at the concluding session. The following summary of Assembly proceedings is supplementary to what was reported as to them in our November issue (page 1080).

■ The opening session of the Assembly of the Association was convened at 10:15 o'clock Monday morning, September 22, in the Public Hall of the Cleveland Public Auditorium. President Carl B. Rix was in the chair.

Joseph C. Hostetler, President of the host Cleveland Bar Association, and Mayor Thomas A. Burke, of Cleveland, welcomed members of the American Bar Association to Cleveland and Ohio. Wm. Logan Martin, of Birmingham, Alabama, responded for the members in attendance.

President Rix relinquished the gavel for the time being to Howard L. Barkdull, Chairman of the House of Delegates, who introduced President Rix for the Annual Address. He characterized President Rix's service to the Association and to the Bar of the country as "a most extraordinary one". (The address was published in 33 A.B.A.J. 985; October, 1947).

President Rix next entertained the offering of resolutions from the floor under the provisions of Article IV, Section 2, of the Constitution. Three were presented:

1. *By John McI. Smith, of Pennsylvania,* a resolution as to the enactment of pending legislation to improve the administration of military justice.

2. *By Miss Dorothy Frooks, of New York,* a resolution criticizing the unlawful practice of law by non-professional persons in the Veterans' Administration.

3. *By John D. McCall, of Texas,* a resolution memorializing the Congress to recognize, confirm, and to renounce to the several States their ownership of the lands and the navigable waters in those States and offshore therefrom.

Annual Meeting of the Association's Endowment

The Sixth Annual Meeting of the American Bar Association Endowment convened, with its President, Jacob M. Lashly, of Missouri, in charge.

An amendment to Article II, Section 1, of the By-Laws of the Endowment was approved, to increase its Board of Directors from five to ten members. (See 33 A.B.A.J. 687; July, 1947).

Reginald Heber Smith, of Massachusetts, was re-elected to the Board of Directors; and the following were elected to the five new positions:

For a one-year term: John W. Guider, of Washington, D. C.;

For a two-year term: Frank E. Holman, of Seattle, Washington;

For a three-year term: Wm. Logan Martin, of Alabama;

For a four-year term: Philip J. Wickser, of New York; and

For a five-year term: Loyd Wright, of California.

The Assembly reconvened to receive nominations for the election of Assembly delegates to the House of Delegates. Results were given in 33 A.B.A.J. 1098; November, 1947.

Second and Third Sessions of the Assembly

The second session of the Assembly, convened on Monday evening, September 22, was devoted to the address of Fred M. Vinson, Chief Justice of the Supreme Court of the United States, on "The Age of Great Challenge". This was published in

33 A.B.A.J. 1084; November, 1947.

At the opening of the third session, Secretary Stecher stated that at the last Annual Meeting the Assembly adopted a resolution presented by Kenneth Teasdale, of Missouri, urging the Senate of the United States to reconsider its Declaration as to compulsory jurisdiction of the International Court of Justice and to eliminate therefrom "the right of determination by the United States as to what constitutes matters essentially within the domestic jurisdiction". The House of Delegates deferred action on this resolution until its Mid-Winter Meeting when it approved Recommendation No. 2 of the Committee on Peace and Law Through United Nations, which recommendation substantially embodied the Teasdale resolution. The action of the House was reported in 33 A.B.A.J. 400; April, 1947. The Assembly then voted to concur in the action of the House.

President Rix then presented James C. McRuer, Chief Justice of the High Court of Ontario, recently President of the Canadian Bar Association, who spoke on the function of the judiciary in government. His address was in 33 A.B.A.J. 1087; November, 1947.

John Foster, M.P., of London, able leader among the younger men of the Conservative party, was introduced to present a message from the General Council of the Bar of England. He and the message were enthusiastically received.

> On the occasion of your Annual Meeting in 1947, the General Council of the Bar of England and Wales sends to the American Bar Association and to all present its sincere and enthusiastic message of greeting and of good wishes for the success of your meeting and for a happy reunion of your members. Reverting to your inspiring message in 1942, in the dark days of the aggressor, we unite with you in the battle for supremacy of justice, a battle which still in many parts of this hemisphere needs the utmost effort of every legal organization and every individual lawyer of the world.

Continuing the discussion as to the three branches of government, Alexander Wiley, Senator from Wisconsin and Chairman of the Senate Committee on the Judiciary, spoke on the function of the legislature. A summary of his address will appear in a subsequent issue.

Arthur T. Vanderbilt, Dean of the School of Law of New York University and Director of the Survey of the Legal Profession, spoke on the plans formulated by the Council for the Survey. The gist of his statement, with a substantial quotation from it, was in 33 A.B.A.J. 1075; November, 1947.

As an extra item on the program a film depicting destruction of the Inns of Court in London as a result of Nazi bombs and incendiaries was shown. Viscount Jowitt, Lord Chancellor of Great Britain, spoke briefly before the showing of the film.

Amendments and Resolutions Are Acted On by the Assembly

The fourth session of the Assembly was convened Thursday afternoon by President Rix. Secretary Stecher announced the results of the election of Assembly delegates to the House of Delegates. (See 33 A.B.A.J. 1098; November, 1947).

President Rix made the bestowal of the Erskine M. Ross Essay Prize for 1947, a check in the sum of $2500, on William Tucker Dean, Jr., of New York, now a member of the faculty of the New York University School of Law. The winning essay, on the subject "How Can International Legislation Best Be Improved—by Multipartite Treaties or by Giving Power to the General Assembly of the United Nations?", was published in 33 A.B.A.J. 878; October, 1947. Mr. Dean gave a short summary of it.

Secretary Stecher reported that the House of Delegates had approved the amendments of the Constitution and By-Laws filed and offered by the Rules and Calendar Committee, published in full on page 782 of the August JOURNAL (with an explanation of the changes at page 781). After hearing a brief statement as to each proposed change, the Assembly adopted the amendments, which thereby became effective.

Concerning the amendment of Article X, Sections 1 and 10 of the By-Laws (see Paragraphs II (3) and (4), page 783, August JOURNAL) to confirm the creation of the new Section of Labor Relations Law, George E. Morton, of Wisconsin, asked if there had ever been a committee appointed to study the "fundamental philosophy" of the social security laws, and moved that the Committee on Employment and Social Security, as revamped by the amendment, be charged with investigation of that question. Secretary Stecher pointed out that under the amended wording of Section 10 of Article X of the By-Laws, the Committee could undertake such a study. President Rix ruled that the motion did not amend the purposes of the amendment as submitted. Mr. Morton withdrew his motion.

Chairman Roy A. Bronson, of California, gave the report of the Committee on Resolutions. In addition to the three resolutions offered at the first session and referred to the Committee, resolutions had been filed by Thomas Marshall, of Texas, on September 10, and by Morrison Shafroth, of Colorado, at the public hearing of the Committee on September 23. Public hearings on the resolutions had been held on September 22 and 23, with executive sessions after each.

Resolution No. 1, by John McI. Smith, of Pennsylvania, favoring the enactment of pending legislation to improve the administration of military justice along lines recommended by the Advisory Committee nominated by our Association and appointed by the War Department, was adopted by the Assembly.

Chairman Bronson next took up Resolution No. 5, and said, in part:

> Resolution No. 5, submitted by Mr. Morrison Shafroth, of Denver, Colorado, relates to the appointment of a committee to investigate and report on the Farben Trials in Germany. A brief in support of the resolution was received by mail from Mr. Shafroth too late for consideration by the Committee . . .
>
> The Committee recommends that the resolution be not adopted in its present form and that a substitute

resolution be adopted by the Assembly as follows:

"WHEREAS, a question has been raised as to whether or not the so-called 'Farben Trials' of German industrialists and scientists now in progress are in accord with American ideals and principles of justice; now, therefore, be it

"RESOLVED, That a special committee be created to investigate and report to the House of Delegates as to whether or not those trials are in accord with American ideals and principles of justice".

John T. Barker, of Missouri, questioned the purpose of the resolution and asked Chairman Bronson whether it was contemplated that a group or committee go to Europe to attend the trials. To this Mr. Bronson said "no", and added that fundamentally the question presented by the resolution was "whether or not these charges that have been made are in accordance with our Anglo-Saxon system". William Clarke Mason, of Pennsylvania, moved to table the resolution. This did not prevail, and the substitute resolution from the Committee was adopted.

The Resolutions Committee next recommended that Resolution No. 2, offered by Miss Dorothy Frooks, of New York, relative to the appointment of a committee to investigate the functions of rating boards of the Veterans' Administration and the work of the occupational and legal members thereof, be referred to the Section of Administrative Law. This proposal was adopted by the Assembly.

Resolution as to State Ownership of Land Under Off-Shore Navigable Waters

Chairman Bronson reported that the Resolutions Committee recommended that Resolution No. 3 be referred to the Committee on Jurisprudence and Law Reform or to such other Section or Committee as the Board of Governors or the House of Delegates might deem appropriate. This resolution related to memoralizing the Congress to renounce to the several States ownership in lands under navigable waters therein and offshore therefrom. Chairman Bronson said that the Committee felt the resolution might be referred to a special committee to be created by the House of Delegates or the Board of Governors for study and report to the House at the Mid-Winter Meeting.

After this motion had been seconded, Mr. McCall, the author of the resolution, stated that although he had previously agreed to go along with such a disposition of his resolution, he had since been urged to seek adoption of it by the Assembly. He then moved (as a substitute for the motion of Chairman Bronson) that the resolution in its original form be adopted. Speaking for his motion and the resolution, he referred to the recent *Tidelands* case (*U. S.* v. *California*, 67 S. Ct. 1658) and quoted his resolution as calling for the Congress to declare the law "to be substantially as follows":

> 1. That the exercise of the federal government's paramount powers in national defense, international affairs and commerce shall not of itself be interpreted as vesting any proprietary interest in the land or resources so defended or dealt with; and,
>
> 2. That, except as to those lands which the government has previously acquired by purchase, condemnation or donation, the respective States own the title to all lands beneath the navigable waters within their boundaries, which as to coastal States includes the marginal shelf, subject to such regulatory powers in the federal government as may be necessary in exercising its constitutional powers of and in national defense, commerce, and international affairs.

At this point Secretary Stecher called the Assembly's attention to Article V, Section 1, sub-paragraph 4, of the By-Laws, which requires that a resolution proposing legislation "be accompanied by ten copies of the bill or by ten copies of a summary of its provisions". President Rix ruled that Mr. McCall's motion on adoption of the resolution in its original form was out of order. Herbert W. Clark, of California, appealed from the ruling of the chair. After some colloquy, the appeal was upheld, and the Assembly resumed consideration of Mr. McCall's motion.

Robert W. Upton, of New Hampshire, a member of the Resolutions Committee, cautioned the Assembly to proceed slowly in taking action on the resolution. He continued:

> . . . You have just heard an elaborate argument intended to prove that the decision of the Supreme Court of the United States is wrong. . . . The argument comes too late. The decision of the Court is the law of the land. The Court has held by its decision that the United States has extremely valuable rights in title [to these] lands. . . .
>
> We do not like . . . to be put in a position of memorializing Congress to give here some valuable portion of the National land. We certainly do not want to be put in the position without opportunity to give full consideration to what is involved.
>
> . . . there is no need for quick action. This matter will not come before Congress for months for final action. . . .

William Clarke Mason, of Pennsylvania, moved a substitute resolution to the effect that it was the sense of the Assembly that the substance of the original resolution be approved.

Henry Upson Sims, of Alabama, speaking on the substitute, declared that "I have always been very positive that this Association should steer clear of political questions . . ." Continuing, he said:

> Of course, my sympathies are that . . . the State of Alabama should own the respective oil lands on the Gulf of Mexico, but I don't think it should be passed on by the Association. If we own it, the Courts can decide it. It can be litigated in many ways. If we don't own it, then, of course, we don't want to claim it under a mere political agitation.
>
> I am opposed to the resolution under every form.

Mr. Mason's substitute was then put to a vote and defeated. Chairman Bronson again moved that the Resolutions Committee's recommendation be adopted. This was carried.

The Committee recommended that Resolution No. 4, by Mr. Marshall, of Texas, calling for the discharge of the Special Committee on the Bill of Rights and the appointment of a new committee, be not adopted. This motion was carried.

President Tweed Reports for the American Law Institute

Harrison Tweed, of New York, was

introduced to give a report for the American Law Institute. President Tweed said the task of compiling *Restatements* of the law is practically complete and that the Institute expects no more financial support from the Carnegie Corporation, whose generous contributions enabled the *Restatements*. At the present time, he said, the principal job of the Institute is the preparation of a Commercial Code, under the general direction of Professor Karl Llewellyn. This project is being financed by the Ford Foundation, of Pittsburgh, Pennsylvania. The Institute plans, Mr. Tweed said, to offer the Code to all States for adoption. The Institute hopes to work in the field of corporations and to do something to solve "the dreadful problem of piece-meal taxation legislation by Congress". He placed emphasis on continuing education of the Bar as a prime objective of Institute plans. He commended the cooperation of the Association and the Institute in this field.

President Tappan Gregory Takes Office at Final Session

The fifth and concluding session of the Assembly was called to order in the Grand Ballroom of the Hotel Cleveland on Friday morning, September 26. President Rix presented Tappan Gregory, of Illinois, as the incoming President of the Association. Mr. Gregory said:

> It has always seemed to me that the greatest honor that can come to a lawyer is to be selected by his fellows for the presidency of this Association.
>
> In accepting it, I do so with a very genuine sense of humility, with appreciation of attendant responsibilities, and with anxiety lest my limited abilities fail to keep pace with my eagerness to render acceptable service.
>
> It is not to one alone to administer the affairs of the American Bar Association. That is something to be undertaken by the Board of Governors, the House of Delegates, and the Assembly, with the President at hand to wield the gavel, sometimes wisely, sometimes when it were better left untouched close by.
>
> Difficult days are ahead, summoning us to continued effort to sustain our leadership, by gathering the reins, guiding the drive of our restive powers, by pressing on with high resolve to contribute, as we may, to the maintenance of peace in the world, by seizing every opportunity to make more effective and more easily available to all the processes of justice and the talents and services of the Bar, by so ordering our affairs that we may wisely employ our every resource to the best advantage in carrying forward all of our activities, unified as always under one banner, the standard of this great Association.
>
> I am most grateful for your confidence.

The 1947 Assembly then adjourned.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1948 Annual Meeting and ending at the adjournment of the Annual Meeting in 1951:

ARIZONA	NEBRASKA
DIST. OF COLUMBIA	NEW JERSEY
CONNECTICUT	OKLAHOMA
ILLINOIS	PUERTO RICO
IOWA	SOUTH CAROLINA
MAINE	SOUTH DAKOTA
MICHIGAN	TEXAS
MISSISSIPPI	WASHINGTON
MONTANA	WYOMING

Election will be held in the State of ARIZONA and in the DISTRICT OF COLUMBIA for State Delegates to fill the vacancy in the term expiring at the adjournment of the 1948 Annual Meeting.

Election will be held in the State of NEW YORK for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1949 Annual Meeting.

State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Nominating petitions for all State Delegates to be elected in 1948 must be filed with the Board of Elections not later than April 9, 1948. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 10) cannot be published prior to distribution of ballots, fixed by the Board of Elections on April 20, 1948.

Forms of nominating petitions for the three-year term, and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. *Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 9, 1948.*

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild
Chairman
William P. MacCracken, Jr.
Harold L. Reeve

American Lawyers to Help Rebuild the Historic Inns of Court

■ Our Association's Special Committee on the Restoration of the Inns of Court, in London, England, has been authorized by the Board of Governors to proceed, under the chairmanship of Former President John W. Davis, of New York, with its plans to solicit all American lawyers for funds to help rebuild and restore those historic shrines of the Common Law which were so savagely damaged by Nazi bombs and incendiaries during the Battle of London in 1941.

This prospect was first broached to our Association by Mr. Davis in 1945 (32 A.B.A.J. 115; February, 1946). The Committee was authorized; it has been making its plans. The extent of the damage was vividly described in the JOURNAL, with photographs of the ravaged structures, by Douglas Gordon, of the Maryland Bar (33 A.B.A.J. 438; May, 1947). Lord Chancellor Jowitt's eloquent peroration, at our Annual Dinner in Cleveland, as to the spirit which still pervades the Inns, is published elsewhere in this issue.

The Committee has created a Fund for the Restoration of the Inns of Court, of which the trustees are John W. Davis, John L. Hall, L. Randolph Mason, George Wharton Pepper, and Joseph M. Proskauer, all of whom are members of our Association's Committee. The Treasurer to whom contributions will be sent is Lowell Wadmond, 14 Wall Street, New York, New York.

The Committee has obtained a ruling by the Treasury Department exempting gifts to the Fund from federal taxation.

The plans of the Committee include the organization of local committees throughout the States. The Committee will proceed with the designation of chairmen of these committees, many of whom have already been named. The Committee is distributing to local committees a pamphlet giving the history of these ancient seats of learning, with special reference to their contribution to our own free institutions and cultural life, also showing pictorially the damage done by German bombing to the Temple Church, Middle Temple Hall and the Hall of Gray's Inn—the buildings which our Committee has chosen to help restore.

The Committee also sends to the local committees a covering letter with the pamphlet, as well as subscription blanks for lawyers who are not members of our Association. Distribution of this material to members of our Association is being made by the Committee.

The local committees are asked to carry on a campaign of personal solicitation of lawyers in all the States, in addition to the material to be sent through the mail, to the end that the greatest number possible of American lawyers be given the opportunity to unite in assisting to restore these monuments to the ideal of freedom under government by law, cherished by free men the world over.

Judicial Selection and Tenure

(Continued from page 1172)

made an outstanding record on the bench.

In 1944 the Democrats were successful, and fourteen judicial candidates, four Republicans and ten Democrats, all approved by polls taken by the Bar Associations, were retained in office. Finally, in 1946 St. Louis went Republican but retained all ten Democratic judges in office.

Thus it should be apparent that partisan political considerations have been effectively removed from voting on the members of the judiciary. In 1944 Judge Laurance M. Hyde of the Supreme Court and I both ran for re-election. He is a well-known Republican; I am a Democrat. Judge Hyde's brother had been a Republican Governor of Missouri and later the Secretary of Agriculture in President Hoover's Cabinet. The name of Hyde is one which has long been prominently and honorably associated with Republican politics. In that election the State went Democratic. Yet Judge Hyde polled about the same vote as I did in our overwhelmingly Democratic counties known as Missouri's "Little Dixie", and I ran about even with Judge Hyde in the solidly Republican counties.

Some Objections to the Plan Considered

The "Missouri Plan" has been criticized in several particulars. No one has contended the plan is perfect, yet we do feel it is a long step in the right direction.

It is apparent that every advantage is with the incumbent seeking retention in office. The plan has tended to freeze in office the judges who were on the bench when the plan was adopted. But unless an incumbent has proved unworthy or incapable, he should be retained in office, under the spirit and purpose of the plan. The plan looks to security of tenure so as to reduce the turnover in judicial personnel, and permits a judicial career to be a life work. It sometimes takes several years to train and season a judge; much judicial talent is lost just as it has become best equipped to do the job.

On the other hand, an unwanted

incumbent can be turned out. In Jackson County in the election of 1942, a judge opposed by the Bar was not retained when he ran for re-election.

Appointments Under the Plan Have Not Been Non-Partisan

Another objection has been that the plan is not non-partisan because the Governors have followed party lines in making appointments. It is true that so far they have, but in each instance their appointments have been lawyers of outstanding character and ability, approved generally by the Bar and the public. But regardless of the political beliefs of those whose names are selected by the Commissions, under this plan the Governor cannot make a poor appointment so long as the Commissions are faithful in their trust.

A Judicial Commission, regardless of its political complexion, has never stacked a list of nominees against the Governor by naming only those of the opposite political party. In every instance those selected have come from *both* parties.

The plan has been criticized as undemocratic. I do not believe this charge is well founded. The plan was adopted by the people themselves for the purpose of improving their Courts—the Courts which assure their liberties and rights under a democratic form of government. The plan does delegate to a representative group the duty of choosing the nominees and to the Governor the selection of the one, but reserves to the voters the right of election.

In the past, choosing judicial nominees has been delegated to political party conventions as representative of the people but this was not believed to be undemocratic. Later, however, even party responsibility was removed by substituting the direct primary for party conventions.

Under the party primary and election system, our experience in Missouri showed that tenure depends on the prevailing political issues, and not upon a judge's ability, qualifications or record. In the twenty-year period between the first and second World Wars, only twice was a judge of the Supreme Court, who had served a full term, re-elected to another term. The ten elections during this period all turned on National party issues, and the records and qualifications of judicial candidates received but little, if any, attention.

It is true that in a democracy political office-holders, and through them the policies and political principles which they avow, must give periodic accounting to the voters. Their submission to "the will of the people" means, in practice, that they and their policies must be judged at regular intervals by a secret ballot, on which the voters are free to oppose them, and to turn to new and different policies. But what political policy or principle can a judge properly entertain about the administration of his office? It is immediately obvious there can be none whatever.

The only principle a judge can advocate is fair, impartial and sure justice to everyone alike. And this must be so, be he a Democrat or a Republican, or be he a liberal Democrat or a Conservative Democrat. I do not believe the charge that the plan is undemocratic has been sustained; to the contrary, the opposite seems true. Under it a judge's record, which is the only true platform upon which he should stand or fall, is submitted to and passed upon by the voters, unconfused with purely partisan political issues. Any plan which tends towards independent judges surely follows the fundamental principles of democracy, even one which goes to the extent of removing judges from the arena of partisan politics.

Political Activity by Judges Is Prohibited Under the Plan

The constitutional amendment embodying the Court plan contains a direct prohibition against political activity by a judge whose office is covered by the plan:

He may not directly or indirectly make any contribution to any political party.

He may not hold any office in a political party.

He may not take part in any political campaign.

When Judge Hyde and I were re-elected in 1944, we spent our entire time at our desks doing our normal work, instead of spending months in campaigning throughout the State, first for nomination at the primary, and then for election at the general election. We were prohibited from making any political contributions. We were thus saved from the usual election-time horde of solicitors for political advertisements and donations. To all of you who have been through a hard campaign, it should be immediately apparent why the plan finds such favor with our bench in this regard. The Circuit Judges who are not now covered by it are eyeing it hopefully.

It has been pointed out that a politician may ordinarily make a good judge if he can stop being a politician when he goes on the bench, but the usual system for election requires a judge to continue to be a politician in order to remain a judge. In this respect we feel we have met that problem. I can safely say the Courts of Missouri have never been held in greater confidence than they are today.

Important Role of Bar Associations Under the Plan

I should not close without mentioning the importance of the organized Bar in the successful administration of the plan. The Missouri Bar is integrated. Its membership includes every lawyer licensed to practice in our State. When a Supreme Court Judge, for example, is up for election, which is State-wide, the Bar polls its entire membership on the question of retaining that judge in office. If the vote is favorable, then the Bar itself assumes the duty of advising the people to vote for his retention. In a number of instances it has caused the county chairmen of the two political parties to join in a public statement printed in the county newspaper, urging a favorable vote.

On the other hand, if the result of the Bar Association's poll is unfavorable, it is then equally its duty to ad-

vise the voters against retaining such judge in office. It seems to me that if in a fair and comprehensive poll a judge cannot win the approval of the lawyers, who are in a position to know him and his qualifications better than anyone else, then that judge is not deserving of retention in office.

This responsibility, as well as the duties directly imposed on the lawyers chosen to administer the plan, both require a high degree of unselfishness and devotion to duty on the part of the entire Bar. But this is not new to the legal profession. No group of citizens, no profession, gives more of its time and effort to public service than lawyers. I am happy the leadership which lawyers have traditionally exercised in government has been augmented by this plan of choosing judges. In this field particularly, no others are as well qualified. Who better can exercise this leadership so unselfishly and only in the interest of equal justice to all, than the lawyers themselves? Under any and every method of selecting judges, the proper administration of justice and its continuing improvement is the lawyers' ever-present responsibility.

2

Erskine Mayo Ross

(Continued from page 1176)

not meet the approval of counsel upon the one side or the other of a controversy, or may not be in accordance with the opinions or the wishes of subordinate officers, cannot be allowed without surrendering the judicial character and confessing the impotency of this department of the government. Courts commit errors, and parties may suffer from the improvidence or corruption of their judges, yet the remedy for these is not in individual resistance or in a resort to private judgment. Every court will hear the appeals of those who conceive themselves to be wronged or threatened with injustice by the execution of its decrees. If its errors be made apparent, it will do justice to itself by dealing justice to parties without fear and without hesitation. There is no excuse for resistance of the orders of the courts in this country where their doors are wide open, and where every human being may be heard in the presence of the whole people.

His View on Punishment for an Offending Judge

The climax of this extraordinary litigation came when Judge Noyes was charged with, and convicted of, contempt of the process of the Circuit Court of Appeals. The majority of the Court imposed a fine of $1000 upon Noyes, but refused to send him to prison because he held a public office! Judge Ross concurred in the judgment of contempt, but objected in the following paragraph (*In re Noyes*) to what he considered the inadequacy of Noyes' punishment:

The findings of fact in the cases of Arthur H. Noyes, Joseph K. Wood, and C. A. S. Frost, embodied in the foregoing opinion of my Brother GILBERT, to the effect that each of those parties committed the contempt alleged against him, meets with my concurrence; but I am of the opinion that the records and evidence in the cases show beyond any reasonable doubt that the circumstances under which and the purposes for which each of those persons committed the contempt alleged and so found were far graver than is indicated in the opinion of the court, and that the punishment awarded by the court is wholly inadequate to the gravity of the offenses. I think the records and evidence show very clearly that the contempts of Judge Noyes and Frost were committed in pursuance of a corrupt conspiracy with Alexander McKenzie, and with others not before the court, and therefore not necessary to be named, by which the properties involved in the suits mentioned in the opinion, among other properties, were to be wrongfully taken, under the forms of law, from the possession of those engaged in mining them, and the proceeds thereof appropriated by the conspirators. For those shocking offenses it is apparent that no punishment that can be lawfully imposed in a contempt proceeding is adequate. But a reasonable imprisonment may be here imposed, and I am of the opinion that, in the case of the respondent Arthur H. Noyes, a judgment of imprisonment in a county jail for the period of 18 months should be imposed, and in the case of Frost a like imprisonment of 15 months.

Judge Ross' Bold Resistance to Interference

Closely allied to his ardor in upholding the judicial process was his intolerance of any interference with the prerogatives of the Courts by the Executive. It is said that one of the few times in his life when he became really angry was on the occasion when the then Attorney General of the United States, Richard Olney, a noted lawyer, suggested to him that all Chinese ordered deported by him under the Geary Act should be discharged from custody and their deportation delayed until financial provision was made for their deportation. This suggestion was in response to a telegram which Judge Ross had sent to the President to complain that the Marshal's plea to the Attorney General for funds for deportation had met with no response. Judge Ross stated that "this practical annulment of the laws and of the orders of the Judicial Department regularly made in pursuance of them, strikes at the foundation of our system of government and cannot be permitted to pass unchallenged."

Olney twice urged delay in the deportation of the Chinese, once in a letter to Judge Ross, and once in a telegram to the United States Attorney for the Southern District of California; but the reasons given in the letter were inconsisent with those assigned in the telegram.

Judge Ross refused to accede to the Attorney General's wishes, and wrote him a letter that ended the controversy in short order. After calling Olney's attention to the inconsistency between the letter and the telegram, and effectually answering Olney's contention that the Geary Act had not yet taken effect and that therefore the Act could not be a foundation for legal proceedings, this blunt statement appears:

It is very strange that you should be ignorant of the fact that Section 13 (of the Geary Act) is a valid, existing law, since it has been so held to be by numerous courts, the opinions of which were duly reported in the *Federal Reporter*, and a number of them were expressly cited in my opinion in the case of the *United States* against *Wong Dep Ken*, decided June 30, 1893, a copy of which opinion was sent to you at the time. . . .

You will perceive that the courts held that Section 13 (of the Geary Act) was not dependent upon the ratification of the then pending treaty between the United States and the Emperor of China, and did become a law. One would suppose that the Attorney-General, before undertaking to disregard an order made by a United States Judge, would inform himself in respect to the law under which such an order was made, especially when the decisions upon the subject are put in his hand.

The truth is that in this business you, following in the footsteps of your immediate predecessor, . . . have made yourself ridiculous. . . .

In the case of the Chinese, you have, upon your own showing, evidently misinformed the President and other officers charged with the execution of the law, and through statements given to the press, have held up my decisions as being without authority of law. I shall therefore feel no hesitancy in making public this response to your letter of September 29th, which was addressed to me in your official capacity. . . .

As a result of this letter, the necessary funds were provided, and the judge's orders of deportation executed. And it is worthy of comment that this courageous action was taken by a Democratic judge against a Democratic administration, headed by the President to whom the judge owed his appointment!

Judge Ross' Participation in Many Noteworthy Cases

Judge Ross participated in many other noteworthy cases. Among the more prominent ones in which he wrote opinions are the following:

The Cuddy contempt case (*habeas corpus* denied, *Matter of Cuddy*, 131 U. S. 280), in which he held the respondent guilty of contempt for attempting to influence a juror;

The Southern Pacific cases, through which the Government recovered hundreds of thousands of acres of public lands;

Bradley v. *Fallbrook Irrigation District*, 68 Fed. 948, in which he held the Wright Irrigation law unconstitutional as violative of the due process clause of the federal Constitution, but was reversed by the Supreme Court (164 U. S. 112); and

U. S. v. *Stanford*, 69 Fed. 25 (aff'd. 161 U. S. 412), in which he upheld the executrix of Leland Stanford in resisting a claim of the Government based on the asserted liability of the decedent as a stockholder.

It is an interesting commentary on the *Stanford* case that the claim of the Government was so large that, if it had been successful, it would have wiped out the Stanford estate and with it the gift that founded Stanford University.

Preferred Bench to Politics; Considered for Supreme Court

The qualities which Judge Ross displayed on the bench attracted so much attention that he no doubt could have pursued a successful career in politics had he so desired. At one time he was urged to leave the bench and accept the Democratic nomination for Governor of California, but he declined to do so. This caused one of the newspapers to make the following pungent comment:

> Judge Ross of Los Angeles has declined to leave the Federal Bench for the nomination, which is to be regretted for the people's sake, as the nomination of Judge Ross would have been an event to hearten all who long to see politics in California lifted out of brainlessness and squalor.

In 1898 he was mentioned in the press as possible presidential timber. Also in the same year, the Los Angeles *Times* suggested him as an outstanding candidate for the office of United States Senator, but he would have none of it.

Judge Ross narrowly missed appointment to the Supreme Court of the United States at least once, and possibly twice. It is stated authoritatively that President Cleveland definitely intended to appoint Judge Ross to the Court when Mr. Justice Field resigned. According to the press Mr. Justice Field having had a bitter quarrel with the President, deliberately withheld his resignation until Cleveland's term expired, in order to prevent Cleveland from naming his successor.

Again in 1909 Judge Ross was seriously considered as the successor of Mr. Justice Peckham; and it is believed that President Taft, who held Judge Ross in high regard, would have chosen him if it had not been for the circumstance that one of the members of the Court, Mr. Justice McKenna, was also a Californian.

Judge Ross became eligible for retirement from the Circuit Court of Appeals on June 30, 1915, his seventieth birthday. When asked if he contemplated retirement, he replied: "I have not even considered it as yet." He did not retire until ten years later.

Investments in Real Estate Enabled His Bequests

In his early days in California, and indeed for a number of years after he first came to that State, Judge Ross, infected no doubt by the enthusiasm engendered by the discovery of gold in California, invested his savings from time to time in gold mines. None of these investments bore fruit. Finally, he acquired a large acreage of agricultural land, upon which was eventually located a substantial section of the southern California city of Glendale. This investment in real estate was so profitable that he left a substantial estate.

Judge Ross died in Los Angeles on December 10, 1928, and was survived by his son. In addition to bequests to members of his family his will left $40,000 to Virginia Military Institute, $5000 to Alpha Tau Omega fraternity, $20,000 to the Children's Hospital of Los Angeles, $5000 to the Salvation Army of Los Angeles, $5000 to the Orthopaedic School-Hospital for Crippled Children of Los Angeles, $20,000 to the Pilgrimage Play in the City of Los Angeles, $50,000 to the Memorial Home for Girls in Richmond as a memorial to his mother and sister, $100,000 to the American Bar Association (sub-

sequent increase in the value of the securities raising its monetary value to more than the stated amount), the annual income (formerly $3000, but now $2500) to be paid as a prize for the best discussion of a subject to be by it suggested at its preceding Annual Meeting, and the residue of his estate to three Protestant Episcopal churches located respectively in Richmond, Los Angeles and San Francisco.

Joined Our Association on Invitation of Ex-President Taft

Judge Ross joined the American Bar Association upon the invitation and proposal of no less a personage than William H. Taft. In 1914, Judge Taft, then a Professor at the Yale Law School, wrote the Judge as follows:

> Honorable Erskine M. Ross,
> Los Angeles, Calif.
>
> My dear Judge:
>
> Mr. Elihu Root, I understand, recently sent you copy of the brilliant address upon Law and Ethics delivered last fall by Lord High Chancellor Haldane of Great Britain before the American Bar Association.
>
> The Association is most anxious that you should be of its membership, and that, if possible, you should attend this year's meeting on October 20th, 21st and 22nd, in Washington, and there meet Mr. Root, Chief Justice Fitzpatrick, of Canada, and Minister Naon, of the Argentine Republic, all of whom are to deliver addresses. I believe I can assure you that if you once attend you will earnestly strive to be present at all subsequent meetings. They are full of profit and pleasure. Besides, we want you with us. There is no initiation fee, and the dues of five dollars, payable later, will carry your membership to 1915.
>
> I ought to say that last year the Association formed a Judicial Section, limited to members who are either Federal or State Appellate Court Judges, and to which a great many Judges have already attached themselves. I hope you will do likewise. One of the features of the next meeting is to be fraternization with the members of the Supreme Court of the United States and a manifestation of our respect for the Court.
>
> May I as a personal favor ask your very kind and prompt consideration of the subject, in the hope that you will afford me the pleasure of proposing you for membership? If you consent, kindly advise me at once of the year of your admission to the Bar.
>
> Sincerely yours,
> Wm. H. Taft

Subsequently in 1921, when Taft was Chief Justice, he had occasion to write Judge Ross again, seeking his views regarding the Equity rules, and in the course of his letter remarked:

> I hope you have not forgotten that we became friends now thirty years ago when I hunted you up in Los Angeles, with reference to the Ricardo-Trumbull case, and remember with much interest poring over your opinions in the contempt proceedings—I think it was—of the "blind boss." I am delighted that you are still making yourself the Rock of Gibraltar out in the Ninth Circuit.

Significance of His Bequest and the Ross Essay Prize

It is not surprising that, of all his philanthropic legacies, the one to the American Bar Association was the largest. Judge Ross always evinced a deep but self-effacing interest in the Association and its affairs, born of the conviction that it was through the organized Bar that the eminence of the law could best be safeguarded and the administration of justice most effectively improved.

The Erskine M. Ross prize, competed for annually by members of our Association, is at once a stimulant to an informed public opinion upon current subjects of vital public importance and a perpetual memorial to an earnest patriot of our profession, a wise, able and fearless judge. The Circuit Court of Appeals of the District of Columbia held, on enlightened grounds, that the recipient of such an award for such a discussion took it tax-free (see 33 A.B.A.J. 804; August, 1947).

Research among his letters and papers does not disclose the particular circumstances which led Judge Ross to put in his will his generous bequest to our Association for the purpose stated. He attended the meeting of the Association in Salt Lake City, Utah, in 1915, took a marked interest in its proceedings, and showed a manifest confidence that the Association could accomplish substantial results for the objectives for which it was formed and in which he deeply believed. Possibly he was present at one or two others; records and recollections fail as to a time so remote. Faithful to his concept of the proprieties of the judicial office, he neither sought nor accepted position or influence in the government of the Association. He was evidently convinced that it, because it commanded the best thought and research in the profession, was above all other institutions best qualified to further the cause to which he was devoted and so he quietly chose it as one of the principal objects of his testamentary benefaction. Thus he set an example which others may wisely emulate.

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not, for instance, have interview with the accused person, or anything of that sort, because we regard that as trial by newspaper, and we regard it as contempt of court), once the case is over, judge and jury and counsel alike are given over to the fullest criticism of the press and everybody else.

Our Judicial System and Procedures Are Not Weapons of Totalitarianism

So long as we have those three things, plus the right of trial by jury and plus the doctrine of *habeas corpus*, then I appeal to you, sir: Have you any doubt whatever but that those are not weapons with which any totalitarian leader leads his country? [Applause]

I, too, am conscious of the traditions of my office. My office started in the year 620. There have been Lord Chancellors for the last 1300 years.

We number in the list saints, sinners, good men, bad men, but on the whole, looking through the long list, men who have striven. And as Augmendus started in 602 to amend the law, I, too, am trying to amend the law today, and I think I may say, not without some success.

Those of you who are interested in this topic may have looked it up in Lord Campbell's *Lives of the Lord Chancellors*. Lord Campbell was a stern—I think an unduly stern—critic. I confess when I render my account to St. Peter I shall be glad if Lord Campbell is not the Clerk of the Court. [Laughter] I would like my epitaph to be: "Notwithstanding all his faults—and they were many and grievous—he found the system of justice good, and he left it better."

The British People are Devoted to Impartial and Fearless Justice

This is not irrelevant to the problems of the day. From the universal respect in which our judges are held, from the recognition of even-handed justice which is given to all our citizens, springs our respect for law and order and it is that respect for law and order to which we can attribute the fact that my people are, I believe, the most law-abiding people in the world, and are willing to put up with all these restrictions, privations and hardships which the circumstances of the day impose, because they know that all other sections of the community are experiencing the same privations, because they know that thanks to our respect to law and order, which in its turn is due to the respect for our judges, there is no black market at home. [Applause]

May I read you the remarks which Sidney Smith made 100 years ago in preaching a sermon? He said this about my country:

> Every man feels that he has something worth preserving and worth contending for. Instances are remembered where the weak prevailed over the strong. One man recalls to mind when a just and upright judge protected him from unlawful violence; gave him back his vineyard; rebuked his oppressor; restored him to his rights; published, condemned and rectified the wrong.
>
> Such is justice. Equal rights to unequal possessions. Equal justice to the rich and poor. This is what men come to fight for and to defend. Such a country has no legal injuries to remember; no legal murders to revenge; no legal robbery to redress. It is strong in its justice. It is then that the use and object of all this assemblage of gentlemen and arrangement of juries and the deserved veneration in which we hold the character of English judges is understood in all its bearing and in its fullest effects.
>
> Men die for such things. The sword of ambition is shivered to pieces against such a bulwark. Nations fall where judges are unjust because there is nothing which the multitude thinks worth defending, but nations do not fall which are treated as we are treated. They rise as we have risen; they shine as we have shone; they die as we have died, too much used to justice and too much used to freedom to care for that life which is not just and free. [Applause]

Those words were spoken 100 years ago and are true today.

Some Observations as to Present Conditions in England

In one or the other of my strange capacities, you might expect me to say something about the conditions of my country as it is today, the nature of the ailment, whether we are going to recover or not. You have a right to ask. You have a double right to ask.

First of all, I regard you of the American Bar Association as our next of kin, and secondly, I profoundly believe that what happens to us is going to have profound repercussions on what happens to you. [Applause] The world is too small, it is too shrunken, today to make it possible for one-half of the world to live in misery and for the other half to live in happiness. It is from your own self-enlightened point of view that I would ask you to look at our problem.

What is the nature of our disease? Will you forgive me if I put it to you quite simply? We are, as I have told you, a small island. We have a population getting towards fifty million people. We produce about one-third of our food and hardly any of our raw materials. How did we live in the past? We lived by our export trade, and our export trade enabled us to buy the food and the raw materials which we required in order to feed that population. The war came, and our channels of export trade were completely dried up. We had great possessions. Sir, we sacrificed all those possessions. We sold out. We stripped ourselves bare for the fight. We got rid of what our ancestors had stored up during the centuries, and we were right, because we were fighting in a great cause! [Applause]

England Stood Alone in 1940 in a Great Cause

When 1940 came we stood alone, and

we were right to go on. Inspired by the magnetic personality and the burning words of Winston Churchill [applause], we set an example to the world. [Applause]

I regret nothing. We stood alone—and never forget this: I don't think some of you quite realize what this means to us, how could you?—we stood alone, save for the example of those great, free sister nations, independent peoples who decided by their own votes to come in and help us: Canada, Australia, New Zealand and South Africa. [Applause] Never let anybody try to cast a shadow between us and those great countries who stood by us in our hour of difficulty! [Applause]

Well, we expended everything; we could not have continued the fight had it not been that this great-hearted country of yours, realizing the true position, came in with that most generous act of statesmanship and gave us Lend-Lease to enable us to carry on the fight.

Sir, we owe to your people (and let this never be forgotten) and the statesmanship that conceived that act, the fact that we can stand as a free people, and the fact that the most frightful tyranny with which the world had ever been threatened was crushed and destroyed. [Applause]

Our People Are Tired and Perhaps Rather Disillusioned

That is our problem. Our capital assets are gone, our export trade is not restored, and let me admit it, after eight years our people are rather tired and perhaps rather disillusioned that after all their sacrifices, instead of looking out on a bright and happy world, we once more see dangers confronting free men. Once more we realize the meaning of that phrase: "Eternal vigilance is the price of liberty."

But I can tell you that notwithstanding all these difficulties, we have made, I think, not unsatisfactory progress. In spite of our food problems, what do I find? Our vital statistics as good as they have ever been; our birth rate has gone up enormously; our maternal mortality and infant mortality rate are lower than they have ever been in any country in the world. And our production, in spite of the fact that many of our machines are obsolescent—we had no chance to renew them in the war; we were concentrating on production of armaments, and that under the fire of the enemy—in spite of that fact, I say, our production today (and I am measuring it in actual production and not in sterling) is 130 per cent compared to the 100 per cent of 1938. [Applause]

"We Have Had To Do Unpopular Things" To Be Prepared

And, sir, we have had to face up to this which I believe is the great and critical test for all democracies: We have had to do unpopular things. We have had to introduce rationing of bread, and in view of the dangers that confront us we have had to introduce conscription which, if I may say so, those of you who are politicians will realize needed some courage to do. We are situated in such a way that if another war comes we know we must profit from the lessons of the past and we must be prepared.

Sir, the way is hard; the going is rough. But, sir, I do not believe that my people who set an example to the world are going to fail in this harder task. I always knew that our soldiers, that our sailors, that our airmen would be brave, but what I did not know was that the people in the dark, the dreary, the dismal streets would behave when the bombs started falling upon them; and when night after night we had this experience, and morning after morning you would see chalked on these little houses, "We can take it, Hitler!" then, sir, I learned my people were made of imperishable stuff! [Applause]

We knew this would happen. We had counted the cost. We went in to help Poland. Poland, be it remembered, was being attacked from two sides, and we went in because we knew that if Poland fell the rest of Europe would fall, and that then we should fall, too.

This all might have been avoided if we had all kept together between those wars. If we and the French had got together when Hitler invaded the Rhineland there never need have been a war at all. Sir, for God's sake, let us learn the lesson of that! [Applause]

I believe that you will find (and it is for you to consider, and I would have you consider it from an enlightened self-interest) that it would not pay you, it would not suit you, to let the bastion of liberty go down. [Applause]

Traditions and Spirit of the Inns of Court Still Live

And, sir, if I may conclude on a note to the lawyers, I would like to say this: We of the law have endured our sacrifices. Those of you who saw yesterday (and I hope many of you in your various Bar Associations will see) the pictures of the Inns of Court, will realize that those places which

3 Message from Britain

are dear to us and dear to you, the Cradle of our Common Law, have suffered grievously. You will realize that Hitler had to destroy those foundations of freedom such as the Common Law. He gave us special attention. But yet, though the Middle Temple, my Inn, is now largely in ruins, the Hall—or most of the Hall—still stands.

Yet when I walk through those ruins in the evening, the traditions of the place seem to cling to it even more clearly than they once did. I can imagine more easily than before, Queen Elizabeth and Shakespeare and *Twelfth Night*. I seem to hear the steps of Raleigh and Drake going to their places in the Hall. I see John Hampden and Burke. I see Dickens, Thackeray, Fielding. I pass by that garden where they gathered the red and white roses for the emblems of the War of the Roses. I see where Blackstone wrote and where Oliver Goldsmith overhead disturbed him.

Sir, Hitler may have destroyed our buildings, but he cannot destroy those sacred memories. [Applause]

The Stirring Message of Our Gracious Queen to Middle Temple Benchers in 1941

When in the year 1941, we asked our gracious Queen, the present Queen Elizabeth, to honor us by becoming a Bencher of our Inn, I confess I was nervous. It was at the time of the "doodle-bugs," and when the "doodle-bugs" came you all got under the table, because every sensible person wanted to avoid if he could the damage to his eyes. I did not much like the idea of Her Majesty getting under the table.

It was said of one of my colleagues —roughly the equivalent of the President of your Bar Association— that he stayed under the table an undue time, and finally emerged holding by the hand a very good-looking waitress. [Laughter]

The Queen, as I knew she would, determined to come, and she came. She said to us these words, and with these words I should like to conclude:

> Whilst our walls may crumble, this is of small account so long as the virtues and graces for which this Inn has ever stood continue unshaken and unshakable. It is upon their foundation that you will rebuild your Courts and chambers. They will rise with a greater strength and a new beauty, and show to all who come to the Middle Temple that though the years pass and wars rage, two things more precious than bricks and stone remain unaltered: the honorable administration of the law, and an unswerving impartiality between rich and poor.

Sir, it is to that ideal that I and my fellow members of the bench and Bar of England have dedicated our lives.

[The assemblage arose and there was prolonged applause.]

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solutism. It is a significant sign of the times that immunity of public officials from the supremacy of the law is being urged along with immunity of administrative agencies from judicial scrutiny of their acts.

Conflicts of Law as to Federal and State Taxation

As to FEDERAL TAXATION, we are told that the Supreme Court in a few cases attempted to clarify questions of appellate jurisdiction as between the Tax Court and the United States Circuit Courts of Appeals and, according to the best text and teaching authorities on taxation, succeeded only in darkening counsel. The tendency to give finality to administrative determinations is in evidence here also. As to State and local taxation, in *McLeod* v. *J. L. Dilworth Co.*[30], the Supreme Court (four justices dissenting) departed from a prior decision that the effect of a sales tax was not different from that of a use tax, and in a later case in the same volume[31] drew what has been pronounced a "very narrow, technical distinction" between them which a State Supreme Court found it difficult to trace with accuracy. The effect of departure from past decisions in upsetting the law far beyond the scope of the case before the Court is well brought out. This can be seen also in the effect on taxation due to the *South-Eastern Underwriter's Assn.* case and the *Northwest Airlines* case. To add to the confusion, a tendency has appeared in some States, where federal and State inheritance tax statutes are identical, to follow the State decisions in construing the State laws rather than those of the federal Supreme Court. This is not a wholly new phenomenon. We used to see the same thing when the federal Courts held to their own views as to the common law as against the Courts of the State. But it is an

30. 322 U. S. 337 (1944).
31. *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 355 (1944).

unfortunate condition for the law, and one could wish that the causes of it might be obviated.

Under LOCAL GOVERNMENT, a comparatively new problem, the legality of collective bargaining contracts between municipalities and unions representing their employees came before the Courts in two States. The right of municipal employees to organize and the propriety of collective bargaining were recognized. But municipalities were not required to recognize a union as sole bargaining agent nor to execute a contract with the union. The California Court considered that in operating a bus line a city was performing a proprietary rather than a governmental function and so was subject to statutory provisions for collective bargaining applicable to private employers. In spite of much kicking at this distinction, with the growth of the service-state and so of the service municipality, Courts still find much use for it. But the line is still as difficult to draw as ever.

Divergent Decisions and Unsettled Law of Many Subjects

The chapter on SOCIAL SECURITY AND WELFARE has to do chiefly with problems of legislation which are largely economic. There is an interesting review of legislation and projects for legislation during the year. As to judicial decision, much had to do with establishing the employment relation. No new principles appeared.

Under PUBLIC HOUSING, PLANNING AND CONSERVATION, there are full statistics, and an account of federal housing legislation and proposed legislation, planning legislation, and conservation projects. Questions of taxation of the property of a housing agency led to divergent decisions, and no decisive result was reached during the year.

In the chapter on COOPERATIVES there are a discussion of ihe Conference on Cooperative Reconstruction, statistics of the volume of business done by cooperatives and expansion of facilities owned by cooperatives, and organization of the National Cooperative Finance Association. All this has more to do with economics than with law, but here are materials conveniently presented in which lawyers may well be interested. The struggle between federal and State efforts to regulate the activities of cooperative utility companies continued. It became apparent that clearer determination of questions affecting cooperatives as to utilities, taxation and anti-trust laws was called for.

As to PUBLIC UTILITIES, the decisions of the Supreme Court in 1944 continued to strengthen the trend which had become apparent in the previous *Annual Surveys of American Law*. Three-fourths of the decisions were by divided Courts. There were twenty-five dissenting opinions in ten cases. A distressing lack of certainty in the law as pronounced by our highest Court was even more apparent in this connection. What is most important, as brought out in a good review of federal and State decisions, is put thus: "The overriding of contractual relations must be a matter of regret to students of the law."

Much of what is well reviewed under the heading WAR-TIME PRICE CONTROL must lapse with the passing of the war-time regime and will have little permanent interest for the lawyer unless price control becomes an established policy in time of peace. This is especially true of the statutory changes during the year and of the decisions interpreting particular words in the statutes and passing on devices for evading the regulations.

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